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1932.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

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1932.—VOL. I.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET,
LONDON, W.C. 1,
AND
PRINTED BY W. SPEAIGHT & SONS, LTD., 98–99, FETTER LANE, LONDON, E.C. 4.

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The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1932, will be as follows:—

In the First Series,
[1932] 1 Ch. [1932] 2 Ch.

In the Second Series,
[1932] 1 K. B. [1932] 2 K. B. [1932] P.

In the Third Series,
[1932] A. C.

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

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1931
March 16, 17, 27.

THE KING *v.* THE MINISTER OF LABOUR. *Ex parte* THE NATIONAL TRADE DEFENCE ASSOCIATION.

SAME *v.* SAME. *Ex parte* THE INCORPORATED ASSOCIATION OF PURVEYORS OF LIGHT REFRESHMENTS.

SAME *v.* SAME. *Ex parte* THE STRAND HOTELS, LIMITED.

Trade Boards—Special Order—Specified Trade—Catering Trade as limited by Order—Definition by Exclusion—Power of Minister—Trade Boards Act, 1909 (9 *Edw.* 7, *c.* 22), *s.* 1—*Trade Boards Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 32), *s.* 1, *sub-s.* 2; *Sch. I.*

By s. 1, sub-s. 2, of the Trade Boards Act, 1918, the Minister of Labour may make a special order applying the Trade Boards Act, 1909, to any specified trade to which it does not at the time apply if he is of opinion that no adequate machinery exists for the effective regulation of wages throughout the trade, and that accordingly, having regard to the rates

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v.
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THE NATIONAL TRADE DEFENCE ASSOCIATION,
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Ex parte.
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SAME.
THE STRAND HOTELS, LD.,
Ex parte.

of wages prevailing in the trade, or any part of the trade, it is expedient that the Act of 1909 should apply to that trade.

Purporting to act under this sub-section the Minister of Labour gave notice of intention to make a special order applying the Act of 1909 to " the catering trade " as set out in a draft special order appended to the notice. The draft special order defined " the catering trade " as " all work performed in or in connection with a catering establishment," and defined " catering establishment " as " an undertaking or branch or department of an undertaking, wholly or mainly engaged in the preparation, supply, or serving of food or drink for consumption at premises or places where such food or drink is served by persons in the employment of the undertaking, or branch or department." The draft special order went on to provide that " the catering trade should not include (*a*) work performed in the provision of lodging; or (*b*) work performed in any branch or department of a hotel, boarding house, or lodging house in which branch or department the food or drink supplied is served wholly or mainly to persons residing therein; or (*c*) work performed in the construction, repair, furnishing or decoration of premises; or (*d*) work performed on board any ship or vessel; or (*e*) the manufacture or bottling of wine, spirits, beer, cider, or perry and work incidental thereto " :—

Held (by Scrutton and Slesser L.JJ.; Greer L.J. dissenting), that it was within the power conferred upon the Minister of Labour by the above enactment to make a special order in the terms of the draft special order.

Rules for writs of prohibition prohibiting the Minister from making a special order in the above terms, discharged.

Decision of a Divisional Court reversed.

APPEALS from the decision of a Divisional Court making absolute three rules prohibiting the Minister of Labour from making a special order under s. 1, sub-s. 2, of the Trade Boards Act, 1918, as stated below.

On August 6, 1930, the Right Honourable Margaret Bondfield, Minister of Labour, acting under ss. 1 and 2 of the Trade Boards Act, 1918 (1), gave notice that she intended

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(1) The Trade Boards Act, 1918 (8 & 9 Geo. 5, c. 32), s. 1, sub-s. 1: " The Trade Boards Act, 1909 (in this Act referred to as 'the principal Act') shall apply to the trades specified in the Schedule to that Act and to any other trades to which it has been applied by a provisional order made under s. 1 of that Act or by a special order made under this Act by the Minister of Labour (in this Act referred to as 'a special order')."

Sub-s. 2: " The Minister of Labour (in this Act referred to as 'the Minister') may make a special order applying the principal Act to any specified trade to which it does not at the time apply if he is of opinion that no adequate machinery exists for the effective regulation of wages throughout the trade, and to make a special order applying the Trade Boards Acts, 1909 and 1918, to the Catering Trade as set out in the special order. Appended to this notice was a form described as a draft special order, which recited that the Minister of Labour (hereafter referred to as "the Minister") was empowered by s. 1, sub-s. 2, of the Trade Boards Act, 1918, to make a special order applying the Trade Boards Acts, 1909 and 1918, to any specified trade to which they did not at the time apply if of opinion that no adequate machinery existed for the effective regulation of wages throughout the trade, and

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that accordingly, having regard to the rates of wages prevailing in the trade, or any part of the trade, it is expedient that the principal Act should apply to that trade." . . . .

Sect. 2, sub-s. 1: "Every special order shall without confirmation by Parliament have effect as if enacted in this Act and may be varied or revoked by a subsequent special order."

Sub-s. 2: "The provisions contained in the First Schedule to this Act shall have effect with respect to the procedure for making special orders."

Sub-s. 3: "Where the Minister makes any special order he shall publish it in such manner as he thinks best adapted for bringing it to the notice of all persons affected thereby, and the order shall come into operation on the date on which it is so published or on such later date as is specified in that behalf in the order."

Sub-s. 4: "Every special order shall be laid before each House of Parliament forthwith, and if an Address is presented to His Majesty by either House within the next subsequent forty days on which that House has sat after the order has been so laid, praying that the order may be annulled, His Majesty may annul the order, and it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder or to the power of making a fresh order."

"FIRST SCHEDULE.

Procedure for making Special Orders.

1. Before the Minister makes any special order, he shall, in such manner as he thinks best adapted for informing persons affected, publish notice of his intention to make the order, of the place where copies of the draft order may be obtained, and of the time (which shall not be less than forty days) within which any objection made with respect to the draft order must be sent to him.

2. Every objection must be in writing, and must state—

(*a*) the specific grounds of objection; and

(*b*) the omissions, additions, or modifications asked for.

3. The Minister shall consider any objection which is made by or on behalf of any persons appearing to him to be affected and which is sent to him within the time fixed in that behalf, but shall not be bound to consider any other objection.

4. After considering all the objections which he is required to consider

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that the rates of wages prevailing in the trade or in any part of the trade rendered it expedient that the said Acts should apply to that trade; and further recited that in the opinion of the Minister it was expedient that the said Acts should apply to the trade specified in the Appendix to the draft special order. The draft special order then proceeded in these terms: "1. The Trade Boards Acts, 1909 and 1918, shall apply to the trade specified in the Appendix hereto." . . . .

The Appendix was as follows: "Draft Definition of the Catering Trade. The Catering Trade (that is to say):—

"1. All work performed in or in connection with a catering establishment.

"2. For the purposes of this Appendix the expression 'catering establishment' means an undertaking, or branch or department of an undertaking, wholly or mainly engaged in the preparation, supply, or serving of food or drink for consumption at premises or places where such food or drink is served by persons in the employment of the undertaking, or branch or department.

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as aforesaid, the Minister may, if he thinks fit, amend the draft order, and the foregoing provisions of this schedule shall apply to the amended draft order in like manner as they apply to an original draft order.

5. In any case in which the Minister does not amend or withdraw any draft order to which any objection has been made in accordance with the foregoing provisions, he shall, before making the order, unless he considers that the objection is of a frivolous character, direct an inquiry to be held in manner hereinafter provided.

6. The Minister may appoint a competent person not in the employment of any Government Department to hold an inquiry with regard to any draft order, and to report to him thereon.

7. The inquiry shall be held in public, and such officer of the Ministry of Labour as is appointed by the Minister in that behalf, and any objector or other person who appears to the person holding the inquiry to be affected, may appear at the inquiry either in person or by counsel, solicitor, or agent.

8. The witnesses at the inquiry may, if the person holding it thinks fit, be examined on oath.

9. Subject as aforesaid, the inquiry and all proceedings preliminary and incidental thereto shall be conducted in accordance with regulations made by the Minister." . . . .

"3. Notwithstanding anything in this Appendix, the Catering Trade shall not include :—

(*a*) work performed in the provision of lodging ;

(*b*) work performed in any branch or department of an hotel, boarding house, or lodging house in which branch or department the food or drink supplied is served wholly or mainly to persons residing therein ;

(*c*) work performed in the construction, repair, furnishing or decoration of premises ;

(*d*) work performed on board any ship or vessel ;

(*e*) the manufacture or bottling of wine, spirits, beer, cider, or perry and work incidental thereto ;

(*f*) operations covered by—

(1) the Trade Boards (Milk Distributive) Order, 1928 (Statutory Rules and Orders, 1928, No. 475) ;

(2) the Trade Boards (Laundry) Order, 1919 (Statutory Rules and Orders, 1919, No. 411)."

After publication of the notice of the Minister's intention to make the special order above mentioned, sixty-nine notices of objection were duly lodged, as a result of which the Minister directed an inquiry to be held, and appointed Sir Arthur Colefax K.C. to hold the inquiry. Among the sixty-nine objectors were the National Trade Defence Association, the Incorporated Association of Purveyors of Light Refreshments, and the Strand Hotels, Ld. These three objectors obtained rules nisi for three writs of prohibition prohibiting the Minister of Labour from proceeding with making the special order applying the Trade Boards Acts, 1909 and 1918, to the Catering Trade as defined in the said order on the ground that it was not within the powers of the said Minister under the Trade Boards Acts, 1909 and 1918, to make a special order in the terms of the draft special order set out in the notice of intention dated August 6, 1930.

On February 5, 1931, the Divisional Court (Lord Hewart C.J. and Avory and Macnaghten JJ.) made the rules absolute.

The Minister of Labour appealed.

The Hon. Sir Stafford Cripps S.-G. and *Lilley* for the appellant. The question in this appeal turns on the meaning of the word "specified" as applied to a trade. The Divisional Court, following the decision of Shearman J. in *Skinner* v. *Jack Breach, Ld.* (1), has held that the trade must have attained the status of a generally recognized trade before it can be "specified." But that is not the necessary implication of the word. A trade may be specified after designation as well as after recognition. The intention and purpose of the Legislature must determine which of these meanings is to be attributed to the word. In this case Parliament obviously intended to confer a remedial power upon the Minister of Labour. To limit this power to trades already recognized would be to impose an arbitrary restriction upon the discretion of the Minister. A recognized trade may consist of many parts. It is plain from s. 1, sub-s. 2, of the Act of 1918 that the Minister of Labour may take notice of the wages paid in part of the recognized trade; and if no adequate machinery exists for effectively regulating wages in every part of the trade, and if accordingly, having regard to the rate of wages prevailing in any part of the trade, it is expedient that the Act of 1909 should apply to the trade, the Minister may make an order applying the Act to the trade. If these unsatisfactory conditions apply to part only of the trade, while no objection can be taken to the wages prevailing in the rest of the trade, is it to be said that the Minister cannot make a special order relating to that part in which the wages require regulation without including in the order the greater part in which regulation of wages is unnecessary? The Court will be averse from giving a construction to the Act which leads to such a conclusion.

Moreover to give full effect to the purpose of the Legislature, the Act must be preventive as well as remedial; otherwise in the early days of a new trade the wage earners would be unprotected. Therefore a trade may be specified whether it be a recognized trade or one which is in process of development. And, as the matter is one with which the good government of the country is concerned, the proper authority appointed to specify the trade is neither the Court nor the public, but the Minister of the Crown. If the trade is not already a recognized trade, it may be specified by definition, which may be either by stating the necessary and sufficient conditions which qualify the trade, or by excluding all trades except the one specified. It is merely a matter of convenience whether one or the other method of definition is used, and what may be defined by either method may, as in the present case, be defined by both.

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(1) [1927] 2 K. B. 220, 229.

[*Gordon Hotels, Ld.* v. *London County Council* (1), a case under the Shops Acts, 1912 and 1913, was also referred to as being in pari materia.]

Wilfrid Greene K.C., *Sir Reginald Mitchell Banks K.C.* and *Henry O'Hagan* for the respondents, the National Trade Defence Association. The question in this appeal is what is meant by the words " any specified trade " in s. 1, sub-s. 2, of the Trade Boards Act, 1918. By that sub-section the Minister of Labour may make a special order applying the Act of 1909 " to any specified trade " to which it does not apply, if he is of opinion that no adequate machinery exists for the effective regulation of wages " throughout the trade," and that accordingly, having regard to the rate of wages prevailing " in the trade, or any part of the trade," it is expedient that the Act of 1909 should apply " to that trade." The result of applying the Act of 1909 to " any specified trade " is that the Minister of Labour (formerly the Board of Trade) may establish a Trade Board for the " specified trade " : s. 2 of the Act of 1909 ; and the Trade Board when established is to fix minimum rates of wages for time work for the " specified trade " and may fix general minimum rates of wages for piecework, and those rates of wages, whether for time work or piecework, may be fixed so as to apply universally to the " specified trade " or to any special class of workers in the " specified trade," or to any special area. It follows from these statutory provisions that the " specified trade " must be one in which, or in any part of which, there is a prevailing rate of wages which may be compared with the wages in other trades and is capable of being effectively

(1) [1916] 2 K. B. 27.

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regulated. This points to the conclusion that the "specified trade" must be some well known and recognized trade or a branch of some such trade, like those specified in the Schedule to the Act of 1909—namely: 1. "Ready-made and wholesale bespoke tailoring and any other branch of tailoring in which the Board of Trade consider"—now the Minister of Labour considers—"that the system of manufacture is generally similar to that prevailing in the wholesale trade." 2. "The making of boxes or parts thereof made wholly or partially of paper, cardboard, chip, or similar material." 3. "Machine-made lace and net finishing and mending or darning operations of lace curtain finishing." 4. "Hammered and dollied or tommied chain-making." The differentia in each of these specified trades is the kind of work done, and not the place where it is done. Secondly, the "specified trade" may be a branch of a well known and recognized trade, for example a special order might be made applying to the sewers of buttons as being a branch of the tailoring trade; and in the same category would be cutters, fitters and pressers; but, it is submitted, a special order could not be made applying to the driving of lorries as being a branch of the jam-making trade and so bringing all lorry drivers wherever employed within the scope of the Trade Boards Act: see s. 5, sub-s. 2, and s. 6, sub-s. 1, of the Act of 1909. If lorry drivers employed in a certain jam manufactory are found to be ill paid they must form a branch of some locomotive transport undertaking before a special order can be made applying to them. In order to be valid a special order must operate horizontally, so to speak. For example, a special order may be made applying to hairdressers' assistants. That order would operate horizontally over the whole stratum of hairdressers' assistants; but an order could not be made applying, not to a horizontal stratum of hairdressers' assistants but to a vertical section of hairdressers' assistants—namely, those employed in a hotel. Again the differentia is the kind of work done and not the place where it is done. The Minister could not make a special order applying in terms to tailors in Lancashire.

The definition of the specified trade by reference to the place in which it is carried on leads to anomalies and uncertainties most undesirable in penal legislation: see s. 6 of the Act of 1909 and the amending section, s. 5, of the Act of 1918. A hotel waiter while serving in the hotel dining-room will not be within the Act of 1918, but if he happens to be serving in a restaurant attached to the hotel, he will be within the Act. Will a pastry-cook's van-driver be within the Act, while a butcher's van-driver is outside it? Will a confectioner's typist be within the Act while a hotel keeper's secretary is excluded from its protection? Secondly, the definition by reference to the place of occupation brings within the Act a number of occupations whose collocation is purely fortuitous and is not based on any reasonable principle. Many trades involve the employment of van-drivers; some of these van-drivers will be within and others without the Act. Thirdly, the definition is wanting in fixity; it is so fluid that it may include a particular person during part of the year and exclude him for the rest; for example, a waiter at a seaside hotel may be within the Act for three months in the year and outside its provisions for the remainder. A hotel which has one room for residents and another for casual visitors may employ waiters who serve in both. When one of these serves in one room he is within the Act, but not when he is serving in the other. These objections apply to all persons who occupy themselves in various places where business is carried on for profit; whether they be orchestral musicians, cabaret performers, and expert dancers, or cashiers, typists, and van-drivers. The trade has to be "specified"; the word "specified" implies species; species implies some real differentia. The proper differentia is the work done by the employee: *Skinner* v. *Jack Breach, Ld.* (1), and not the place where the work is carried on. The draft special order applies the test of the place where the work is carried on and is therefore wrong.

Macaskie K.C. and *G. G. Honeyman* for the Incorporated Association of Purveyors of Light Refreshments and

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(1) [1927] 2 K. B. 220.

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A. T. Miller K.C. and *L. H. Gluckstein* for the Strand Hotels, Ld., adopted the argument for the National Trade Defence Association.

The *Solicitor-General* replied.

Cur. adv. vult.

March 27. The following written judgments were delivered:—

SCRUTTON L.J. The Minister of Labour is proposing to make an order under the Trade Boards Acts, 1909 and 1918, applying the Acts to the "Catering Trade" as defined in the draft order. At the instance of three persons or Associations claiming to be interested the Divisional Court has made absolute three rules prohibiting the Minister from proceeding with the draft order on the ground that it is ultra vires. The Minister of Labour appeals.

The Trade Boards Acts were originally intended to provide for the establishment of a minimum wage in trades where exceptionally low wages were in existence, by applying the Trade Boards Acts to any trade of that description, so that a Trade Board might be established with powers to fix a minimum wage which, at the least, must be paid within its jurisdiction. Sect. 1, sub-s. 2, of the Act of 1909 empowered the Board of Trade, now the Minister of Labour, on certain conditions "to make a Provisional Order applying this Act to any specified trade to which it does not at the time apply." The conditions of the jurisdiction of the Minister were: (1.) that the Minister should be satisfied that the rate of wages prevailing in any branch of the trade is exceptionally low as compared with that in other employments, and (2.) that the other circumstances of the trade are such as to render the application of this Act to the trade expedient.

The Act of 1918 repealed the above section of the Act of 1909 and substituted as conditions of jurisdiction (1.) that the Minister should be satisfied that no adequate machinery exists for the effective regulation of wages throughout the trade, and (2.) that having regard to the rates of wages prevailing in the trade or any part of the trade, it is expedient that the Act of 1909 should apply to the trade.

While in the Act of 1909, the order of the Minister had to be confirmed by Parliament, the Act of 1918 gave greater powers to the Minister by providing that he should hold an inquiry at which objectors might be heard before making the order, but that when made it should have effect as if enacted in that Act; that is, the Minister is given by Parliament power to legislate if certain conditions are fulfilled. The result seems to be that if those conditions are fulfilled, the Minister has absolute discretion to make the order. The judges under those circumstances have no power to overrule the Minister. They may think the order unwise, or even unintelligible, but they are not the persons to decide that matter if the conditions giving the Minister jurisdiction are fulfilled. If they are not fulfilled, the Courts have power to interfere by prohibition.

The first condition seems to be that before the Minister acts there must be "a trade" in existence; and the Minister must form an opinion that in that existing trade there is no adequate machinery for regulating wages, and that having regard to the rates of wages then prevailing in the trade or part of the trade, it is expedient that the Trade Boards Act should apply to the trade. The Minister need not state the evidence on which he acts; his honest opinion as to the sufficiency of the rate of wages and the absence of adequate machinery is sufficient. It is not for the Courts to say whether such legislation is desirable, or to doubt whether a Minister, a politician, or even an all wise Civil Service can successfully manage all the trades in England. Parliament has given that power to the Minister.

The Minister however must consider an existing trade, and here the difficulties at once begin. The affidavit of Mr. Barron for the opponents says: "The Minister cannot create a trade by definition. She can only specify a definite trade." I doubt whether there is such a thing as a "definite" trade. The boundaries of a trade are always uncertain, and need definition or specification by some one. Parliament, in my opinion, has given that power of definition or specification to the Minister, with this qualification, that

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there must be some subject matter which can be reasonably described as "a trade" before its exact limits are defined. For instance, if an enthusiastic Minister conceived the idea that he could introduce regulated hours and wages at one fell swoop into all industries by applying the Trade Boards Acts to "the Trade of supplying for reward manual labour to employers," I think the Courts could prohibit him on the ground that there was no such existing or recognized trade. To come nearer to reality, I doubt whether an order as to the "Trade of supplying illumination," defined as including the making and supply of electricity, gas, oil lamps and candles, would be an existing trade in relation to which the Minister could make an order.

A further difficulty is created by the fact that I do not think Parliament, when passing the Act, considered whether they meant a "trade" from the point of view of the workman, his particular craft, as the trade of a waiter, or of a cook, or a trade from the view of the employer, who in carrying out his trade employs both waiters and cooks. The result in the existing Trade Board Orders is that an employer in his one trade may find himself obliged to comply with the orders of half a dozen Trade Boards; see the Toymaking Order; or a workman such as a painter may find himself concerned in Trade Boards for half a dozen trades in which painters are employed by employers.

Some light is thrown on the question whether Parliament took any particular view of this question by other portions of the Acts. The Act of 1909 is first to apply to the trades specified in the Schedule to the Act. There are four trades in that Schedule. The first is: "Ready-made and wholesale bespoke tailoring and any other branch of tailoring in which the Board of Trade consider that the system of manufacture is generally similar to that prevailing in the wholesale trade." This appears rather to point to the trade of the employer than to the craft of the workman; I doubt whether a workman would describe himself as a ready-made or bespoke tailor; he seems to be employed by a master in that trade. The other three trades in the Schedule are ambiguous, and might relate either to the employer's trade or the workman's craft. Next an Act of 1913, the Trade Boards Provisional Orders Confirmation Act, 1913 (3 & 4 Geo. 5, c. clxii.), confirms certain orders applying the Acts. The first relates to "Sugar confectionery and food preserving, that is to say, the making of sugar confectionery . . . . pickles . . . . meat in a preserved state . . . . and the processes of wrapping filling . . . . and labelling of articles so made." It is clear that Parliament thinks that this is a trade and definition which comes within the Acts. Similarly the trade of shirtmaking is defined by excluding wholesale or bespoke tailoring, and knitted articles. Linen and cotton embroidery is defined as certain specified branches of the trade of making up articles of linen and cotton. Next, s. 1, sub-s. 1, of the Act of 1918 confirms all provisional orders made up to that time, and all special orders to be made by the Minister under the Act of 1918. While this prevents orders made up to the coming into effect of the Act of 1918 from being questioned, in my opinion orders made after the Act of 1918 must, in spite of s. 2, sub-s. 1, still comply with the conditions giving jurisdiction which I have already referred to. We have been handed a bundle of orders already made by the Minister to which I refer for details. From all this it appears that Parliament has given great liberty to the Minister in his definition of the "trade" to which the Act applies. He has been allowed to specify a trade by definition and exclusion; and to specify a trade as a branch of another trade.

Under these circumstances the Minister proposed to make an order applying the Acts to "the Catering Trade." It can hardly be disputed that some people thought there was such a trade before the Minister proposed to specify it. The North Western Caterers, the National Caterers Protection Society, the Residential Hotels and Caterers Association and the Catering Trades Unemployment Association were among the objectors to the order. I think it is equally clear that it would be difficult to get general agreement to any definition of the "Catering Trade," and in my view the Minister has been appointed by Parliament to define it. The Minister has done so by describing the catering trade as "all work performed in or in connexion with a catering establishment"; and by then defining "catering establishment": "For the purposes of this Appendix the expression 'catering establishment' means an undertaking or branch or department of an undertaking, wholly or mainly engaged in the preparation, supply, or serving of food or drink for consumption at premises or places where such food or drink is served by persons in the employment of the undertaking, or branch or department." She has next said that the definition is "not to include" certain matters; that is, she has defined partly by exclusion. For instance, residential hotels as defined in the order are excluded. The objectors, the Residential Hotels and Caterers Association, can hardly complain of this, as they themselves distinguish keepers of "Residential Hotels" from "Caterers." Having considered the Acts, and the orders sanctioned by Parliament, I cannot see that this Catering Order has exceeded the very extensive powers given to the Minister by Parliament. I think some of the provisions of the order, especially that as to residential hotels, will be very difficult to work in practice, and that if only one Trade Board is appointed under the order, it will be difficult to get any satisfactory representation of employers and employed without making the Trade Board of unwieldy and unmanageable size. But this can be cured by appointing more than one Trade Board. I had some doubt whether that wealthy and powerful institution, the Licensed Victuallers, sometimes called "The Trade," was not so marked an identity that it ought not to be insulted by being put in the same category as railway restaurant cars or street coffee stalls, and should not have to listen to the indignity of hearing discussions whether both it and an ice cream seller on his tricycle were caterers. But licensed victuallers certainly supply drink in an establishment, though some of them are not so eager to supply food as one would wish.

The reasons given by the Court below for issuing a writ of prohibition are as follows. The Lord Chief Justice, with whom Avory and Macnaghten JJ. concur on this point, takes the view that the order does not apply to a trade, but to part of a trade. I do not think this correctly appreciates the powers of the Minister. He may define by exclusion as well as by description. People may differ as to whether supplying board and lodging, or letting service flats, comes within the "Catering Trade," but Parliament has appointed the Minister to define an existing trade, and he may do so either by framing a definition which would exclude by its terms lodging houses and service flats, or by excluding them from a definition which would otherwise include them. The whole definition, with its exclusions, is the definition of the trade. The second objection of the Lord Chief Justice is that the definition may include persons who do not themselves carry on a vocation of catering, though they are employed in a catering establishment. But if they serve an employer in his trade of catering they are, in my opinion, within a trade for which an order may be made under the Acts in question. There may conceivably be cases where a person employed in a catering establishment may not be in the catering trade, as if, in the premises where a catering trade is carried on, there is a bootshop carried on by the catering employer, but having nothing to do with his catering trade; but one would have to know the facts in any particular case, to express an opinion on the question. There is, I think, no other reason given for issuing the writ of prohibition in the Lord Chief Justice's judgment; the two reasons given are, I think, insufficient to support the judgment.

Avory J., as I understand him, adds a further reason that the draft order is uncertain in its operation, not clear and unambiguous. I think the administration of the order may require considerable and difficult investigation into facts, but when the facts are ascertained, I do not think the order is uncertain in its operation. I do not think ambiguity or difficulty of interpretation is any ground for prohibition. The judges are not judges of the order to be made, but only of whether there is jurisdiction to make it, and Parliament has given the Minister very wide powers. One may doubt whether we shall really be any better off when everything a British caterer may want to do is regulated for him by orders of the Minister on the advice of the Civil Service; but that is a matter for Parliament, and not for the Law Courts.

The judgment of Macnaghten J. appears to me to proceed on the two grounds: First, that this is an order for part of a trade only, and should provide for a whole trade. I take the view that it is an order for a trade defined partly by exclusion, and that in a trade of vague limits it is for the Minister to define the trade and not for the Courts. Secondly, he says that it must be the trade of the workman and not the trade of the employer. In my view, the language of the Acts, and the nature of the orders which Parliament has confirmed, does not support that view; the trade may be either the trade carried on by the employer or the trade of which the workman is a craftsman.

For these reasons, in my opinion, the judgment of the Court below was erroneous and the writs of prohibition should not issue, the rules nisi being discharged.

A minor point arises in this way. It was contended that the Minister having held an inquiry was going to issue an amended order without giving any opportunity of objecting to the amended terms. At the inquiry the representative of the Minister said: "That is the way in which the Ministers have proceeded in the past on advice . . . . and the Minister is prepared to stand before the Tribunal and answer for anything she may do in this connection." Accordingly at the hearing the Solicitor-General did argue that the Minister could make substantial alterations in the draft order after the inquiry, and issue them as an order without republication and a fresh inquiry. The question depends on the language of the First Schedule to the Act of 1918, especially on r. 4. It seems to me clear that this means that before any order is made persons affected shall have an opportunity of seeing and objecting to its terms, whether those terms are in the original or the amended draft. The amendments may be such that an interested person, who did not object to the original order, would strongly object to the amended order;

and yet, if the Minister's view of procedure is right, he would have no opportuity of so objecting. The Solicitor-General agreed that if the Minister held no inquiry, but, after considering the objections lodged to the original order, proposed to make substantial alterations, he must republish the draft order with the proposed amendments to give an opportunity for objections to the proposed amendments. But he argued that this did not apply to amendments after the inquiry. I cannot see any justification for this in the terms of the Schedule, and on the merits it seems that every person interested should have an opportunity of objecting to any terms of the proposed order, whether original or amended. The Court below expressly declined to give an opinion on this point, but, for some reason which I cannot understand, two of the orders were drawn up as if the Court had expressed an opinion against the Minister, which they certainly had not. I think it right to express the opinion that if the Minister after an inquiry proposes to make substantial amendments in a draft order, amendments other than merely verbal alterations, or alterations in punctuation, he must republish to give an opportunity to persons interested to object to the new terms. If they do object, unless the Minister considers the objections merely frivolous, he must hold another inquiry.

The appeals must be allowed with costs and the rules nisi for prohibition discharged.

GREER L.J. Sect. 1 of the Trade Boards Act, 1918, provides that the Trade Boards Act, 1909, shall apply to the trades specified in the Schedule to the Act of 1909, and to any other trades to which it has been applied by a provisional order made under s. 1 of that Act, or by a special order made under the 1918 Act by the Minister of Labour.

The trades specified in the Schedule to the Act of 1909 are: "(1.) Ready-made and wholesale bespoke tailoring and any other branch of tailoring in which the Board of Trade consider that the system of manufacture is generally similar to that prevailing in the wholesale trade. (2.) The making of boxes or parts thereof made wholly or partially of paper, cardboard, chip, or similar material. (3.) Machine-made lace and net finishing and mending or darning operations of lace curtain finishing. (4.) Hammered and dollied or tommied chain-making."

The only provisional orders made under the 1909 Act were the orders confirmed by the Trade Boards Provisional Orders Confirmation Act, 1913. These orders applied the 1909 Act to four trades specified in their respective appendices. These trades are described as follows: "Sugar confectionery and food preserving (that is to say) the making of sugar confectionery cocoa chocolate jam marmalade preserved fruits fruit and table jellies meat-extracts meat-essences sauces and pickles the preparation of meat poultry game fish vegetables and fruit for sale in a preserved state in tins pots bottles and similar receptacles the processes of wrapping filling packing and labelling in respect of articles so made or prepared. Shirtmaking (that is to say) the making from textile fabrics of shirts pyjamas aprons and other washable clothing worn by male persons excluding articles the making of which is included in paragraph 1 of the Schedule to the Trade Boards Act, 1909, and excluding articles which are knitted or are made from knitted fabrics. Hollow-ware making (that is to say) the making of hollow-ware (including boxes and canisters) from sheet-iron sheet steel or tin-plate including the processes of galvanizing tinning enamelling painting japanning lacquering and varnishing. Linen and cotton embroidery (that is to say) those branches of the trade of making up articles of linen or cotton or mixed linen and cotton which are engaged in the processes of hand-embroidery drawn thread work thread drawing thread clipping top-sewing scalloping nickelling and paring."

Pursuant to the Rules contained in the First Schedule to the Act of 1918, the Minister of Labour, Miss Bondfield, gave notice of intention to make a special order applying the Trade Boards Acts to the catering trade, and having duly complied with rr. 1 to 4 and considered the objections made by persons interested, she decided not to amend or withdraw the draft order, and therefore, as required by r. 5, she directed an inquiry, which was duly held as provided by rr. 6 to 10. The Minister claims that she is empowered by the Act to make a special order in the words of the draft order without any amendment. These proceedings by way of application for a writ of prohibition were taken to test her right to make such an order. It was not contended either before the Divisional Court or in this Court that the Court had no jurisdiction to issue a writ of prohibition, if an order in the terms of the draft order was outside the statutory powers of the Minister of Labour.

The question involved in the appeals is whether the draft order is an order in which a trade or trades is or are "specified" within the meaning of s. 1, sub-s. 1, of the Act of 1918. The draft special order provides that the Trade Boards Acts, 1909 and 1918, shall apply to the trade specified in the Appendix. The Appendix reads as follows: [The Lord Justice read the definition of the Catering Trade in the Appendix, as set out above, and proceeded :] It was contended by the Solicitor-General on behalf of the Minister, that the Act empowered the Minister to apply the Act to any work carried on by an employee in the establishment or undertaking of an employer carrying on a trade defined by the Minister. For example, many companies carry on the trade of shipbuilding. The Minister, it is contended, could specify and define the shipbuilding trade as the trade carried on by shipbuilding undertakings or establishments, or some limited part of it, and if she did so the Act would then apply to all persons employed in such undertakings or establishments, or such limited part thereof. Though the Act would apply to all persons so employed, it does not follow that a Trade Board would be set up, or that a minimum wage would be fixed for all such employees. The Minister could order under s. 2, sub-s. 1, of the Act of 1909 that a Trade Board should be established only for a branch of work in the trade. He contended broadly that the Minister has power to specify a portion only of the trade carried on by a trading establishment as the trade to which the Acts are to apply.

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The respondents, on the other hand, contended that the Trade Boards Acts are directed to the protection of workers working in specified trades or spheres of work. The persons for whose protection the statutes were passed are, according to this argument, persons engaged in the characteristic work of a specified trade, not all the persons employed by an employer carrying on a specified trade. There is nothing in the wording of the Schedule to the Act of 1909, or of the orders confirmed by the Confirmation Act of 1913, to help in determining the correct interpretation of s. 1 of the Act of 1918. " Wholesale Tailoring Trade " may mean all the work done by the employees of a wholesale tailor, or it may mean the tailoring work done by tailoring workers in a wholesale tailoring establishment. The description contained in the Appendices to the 1913 Confirmation Order seems to indicate that the trade which is being specified is the trade as defined by the work the employee is doing rather than the nature of the business carried on by the employer. But this indication seems to me too slight to enable me to imply with any degree of certainty that the trade to be specified under the Act of 1918 is the trade as defined by the work the worker is doing, rather than the general character of the trade his employer is carrying on.

There is, however, one provision in the Act of 1918 which strongly supports the contention of the respondents. Sect. 3, sub-s. 4, provides that where a Trade Board fix a minimum rate for a class of workers in a trade, the Board may, if the class consists of persons who are learning the trade, attach such conditions as the Trade Board think necessary for securing the effective instruction of those persons in the trade. In this sub-section the trade which the person in question is learning may be, for example, the trade of a carpenter, or of a bricklayer, or of a waiter; it cannot mean the trade of the employer. The Legislature has used the words " the trade " in this sense in s. 3, sub-s. 4, of the Act, and it seems probable that they used the words " the trade " in s. 1, sub-s. 1, in a similar sense. Before the Minister makes any order under the Acts, she has to form the opinion that no adequate machinery exists for the regulation of wages throughout the trade: s. 1, sub-s. 2. To do this she must find that there is something that is a trade in which no such adequate machinery exists. Until she is able to find the existence of such a trade, she cannot act. She cannot artificially make up a catalogue of various kinds of work, in some one of which there is no such adequate machinery existing, and lump them together and specify them as a trade to which the Acts are to apply. How can the Minister, having ascertained that there is a trade described by the words, "the Catering Trade," which is without such adequate machinery, define the trade as meaning work performed in or in connection with a catering establishment, but not including the work set out in cl. 3 of the Appendix to the order? In my judgment, though the question is not free from difficulty, the Minister has no power to do this. The trade within the meaning of the Act is the class or kind of industrial employment in which there is no adequate machinery for the regulation of the wages of the workers. If it be desired by the Minister to apply the Act to the boot-making trade, and she so applied it by special order, the Act would, in my opinion, apply to all workpeople employed in the trade of boot-making, that is, the manufacture of boots. It would not apply, nor could the Minister by special order relating to the boot-making trade, apply the Act to the carters who carted and delivered boots from the factory to the retail purchaser. Nor could she, in my judgment, say the Act is to apply to establishments employing 100 workers, but not to establishments employing less than that number. Nor could she by special order apply the Act to the making of boots in London but not to the making of boots in Northampton. I agree with the opinion expressed by Shearman J. in *Skinner* v. *Jack Breach, Ld.* (1), that "'specified' does not mean anything which the Minister of Labour chooses to call a trade." A trade before it can be specified must, in my view, be "a recognized species of industrial work."

(1) [1927] 2 K. B. 220, 229.

It follows from the consideration above stated, to adopt the convenient metaphor used by Mr. Greene in his argument for the respondents, that the Minister must apply the Act to the horizontal sections of industry, that is to say, to descriptions of industry, whatever the main business of the employer may be, and not vertically to all persons in the employ of an employer who can be said to be engaged in a recognized industry. For example, a special order applying the Act to the joinering trade would apply it to all joiners whether employed by a builder, a master carpenter or a refreshment contractor, but would not apply to a carter employed by a master carpenter. This construction of the Act avoids many difficulties that would arise if the appellant's view is adopted. If the occupation of a barman in a public-house is an occupation in the catering trade, looked at from the occupational point of view, he would be within a special order applying the Act to the catering trade, whether he were serving a customer with beer to be drunk on the premises or a customer in the jug and bottle department with beer to be drunk off the premises. His need or otherwise for a living wage would be just the same whether he was in the one department or the other. The same would be true of a hotel waiter sometimes engaged in the hotel restaurant, sometimes in the hotel dining-room. It seems to me to be required by the Trade Boards Acts that when the Minister has formed the opinion that there is a trade for which no adequate machinery exists for the regulation of wages, her power is confined to specifying that trade, and then the Act automatically applies to the entirety of that trade. But it does not follow that the Minister must then establish a Trade Board for the whole of that specified trade or one for each branch of it. She may under s. 2, sub-s. 1, of the Act of 1909 establish a Trade Board for such branch or branches of work in the trade as she may decide. She must at least apply it to some one branch of the work in the trade. In no event could the Minister in applying the Act to a trade apply it to work in connection with the specified trade. The work of a carting contractor doing by contract the carting of food for a catering establishment would not be work in the catering trade looked at either vertically or horizontally, but his carters would by the draft special order we are considering be brought within the Act. A working carter in the employ of the carting contractor would be doing work "in connection" with a catering establishment. The Act would apply to him, though neither his own work, nor the business of his employer, could rightly be described as catering trade.

To sum up, the draft special order is, in my judgment, bad, and the order absolute for a prohibition made by the Divisional Court is right for three reasons. First, I think the trades to be specified by a special order are not the whole of the trades carried on by a trading employer, but the trades as determined by the work done by the workmen whose minimum wage is to be determined by the Trade Board when appointed. Secondly, the function of the Minister, in the first place, is to name something that can be described as an existing trade at the time the special order is made. The Act will then apply to the whole of that trade, though at a later period the Minister may have to consider whether a Trade Board should be established for the whole of the industry, or only for a part of it. I think the Minister might specify what I may describe as a trade within a trade—for example, the trade of a waiter—and thereby apply the Act to a recognized section of the wider trade; but I do not think that the Minister has any power, once she has specified the trade, to make exceptions which would prevent her or her successor from establishing a Trade Board for that portion of the trade which is within the excepted sections; though, of course, under the express provisions of the Act she could exclude those sections for which a provisional order or special order had already been made. Thirdly, I think the order is bad, because it purports to include in the trade work which may be done in another trade if it is done "in connection with the specified trade."

For these reasons I think the Divisional Court was right in making the order for a prohibition absolute, and that

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this appeal should be dismissed; but as my brethren think otherwise it will be allowed.

On the view I take of this appeal it is unnecessary to say anything as to that part of the order made in two of the cases, which prohibited the Minister from making any other special order without complying with the provisions of s. 22 of the Trade Boards Act, 1918, and clauses 1 to 4 of the First Schedule to the Act. The Divisional Court gave no judgment on this question, and the words ought not to have been included in the order. If any order ought to be made by the Court of Appeal, on my view of the case these words should be struck out of the order made by the Divisional Court.

Slesser L.J. By s. 1, sub-s. 2, of the Trade Boards Act, 1918, the Minister of Labour may make a special order applying the Trade Boards Act, 1909, to any specified trade to which it does not at the time apply, if she is of opinion that no adequate machinery exists for the effective regulation of wages throughout the trade, and that accordingly, having regard to the rates of wages prevailing in the trade, or any part of the trade, it is expedient that the Trade Boards Act, 1909, should apply to that trade.

According to a report of the Minister of Labour dated 1926, which was handed to us, representations having been made to the Minister of Labour that the rates of wages prevailing in the catering trade and the lack of industrial organization in that trade were such as to render the application of the Trade Boards Acts necessary, a non-statutory inquiry was undertaken to ascertain whether there was a case for issuing a statutory notice of intention to bring the trade under those Acts. The inquiry was limited to establishments engaged in the light refreshments and dining-room (non-licensed) branch of the catering trade; and on August 6, 1930, the Minister gave notice of intention to make a special order applying the Trade Boards Acts, 1909 to 1918, to the catering trade. In that notice of intention it was stated that objections to the draft special order must be sent so as to reach the Minister of Labour within seventy days from August 8, 1930, and it was also stated that every objection must be in writing and must specify (*a*) the specific grounds of objection, and (*b*) the omissions, additions or modifications asked for.

The Appendix annexed to the notice of intention was as follows : [The Lord Justice then read the draft special order and the Appendix thereto which are set out above, and proceeded :] The Minister duly considered the objections made and decided to proceed with the order, and directed an inquiry. On November 24, 1930, the public inquiry was duly held by Sir Arthur Colefax with regard to the draft special order. The inquiry continued from day to day until December 8. The Minister subsequently asserted that she intended to make the special order.

On February 5, 1931, the Divisional Court made absolute three rules for writs of prohibition against the Minister proceeding with the order. The writs, taking one as an example, were in the following terms : "A writ of prohibition be awarded to prohibit the Minister of Labour from proceeding with making the special order pursuant to ss. 1 and 2 of the Trade Boards Act, 1918, applying the Trade Boards Acts, 1909 and 1918, to what is described as 'The Catering Trade' and defined by the said Minister in the draft special order." One of the rules was obtained by the National Trade Defence Association and the others by the Incorporated Association of Purveyors of Light Refreshments and the Strand Hotels, Ld., respectively in the same terms, but with the addition of a further prohibition to the following effect, prohibiting the Minister "from making any other special order without complying with the provisions of s. 2, sub-s. 2, of the Trade Boards Act, 1918, and clauses 1 to 4 of the First Schedule of the said Act."

The substance of this appeal is directed to matter common to the three writs and indeed, as the writs were issued as prayed against the draft order apart from any question of making another special order, the learned Lord Chief Justice stated that he did not think it necessary to decide the second ground, inasmuch as it appeared to him on the major ground that the writ of prohibition ought to be issued.

The Minister appeals from all three orders of the Divisional Court. By the Trade Boards Act, 1909, there was established for the first time since the Elizabethan Statute of Apprentices (save for certain Acts dealing with particular trades passed mostly in the eighteenth century) machinery for instituting a statutory minimum wage for workers in certain trades. The Act by s. 1 applied, first, to certain trades specified in the Schedule to that Act, and secondly, to any other trades to which it was to be applied by provisional order of the Board of Trade.

The fundamental argument in this case has turned upon the meaning of the word "trade" in the statutes. Mr. Wilfrid Greene for the respondents contends that in the statutes "trade" must be regarded generally from the point of view of the workers in the trade—the "tradesmen," and that so regarded, for reasons which I elaborate hereafter, there is no such trade as the "catering trade," either as defined in the impugned order or otherwise. He says that what is common to many workers, so as to constitute their work a trade, must be sought in a community of vocation and not of commerce, and that catering is not a common vocation. The Solicitor-General, on the other hand, construes the word "trade" to mean a common employment from the point of view, not of the occupation of the worker, but of the industrial undertaking as such, and further says that the catering trade is or may be such an undertaking.

On this all-important question I have come to the conclusion that the word "trade" in the Trade Boards Acts means the industrial undertaking or commercial adventure and not the collective occupation of the tradesmen, using that word in the old sense, for the following reasons:—

First, if regard may be had to the trades actually specified by name in the 1909 Act, as a help in interpreting the mind of the Legislature, I think that the reference there in the Schedule to "Ready-made and wholesale bespoke tailoring and any other branch of tailoring in which the Board of Trade consider that the system of manufacture is generally similar to that prevailing in the wholesale trade" points to the

Solicitor-General's interpretation being the correct one, for in the Schedule a distinction appears to be drawn between trades wholesale and trades not wholesale, and such a distinction points rather to the industry than to the worker in it; that is to say, there is no reference to wholesale or retail tailors as tradesmen, but to wholesale bespoke tailoring and the wholesale trade as businesses. In *Skinner* v. *Jack Breach, Ld.* (1), Lord Hewart C.J. says: "There must be trade in the sense of commercial employment, but if that is present it does not matter that the description of the work done by the worker is not exhaustive of the description of the whole business of the employer. . . . . It is immaterial that mending nets"—(the subject of a Trade Board Order in that case)—"was not the whole of the respondents'"—i.e., the employer's—"business." These words seem to show that, in considering whether the mending of nets need or need not be the whole of the employer's business to bring the work within the order, the learned judge was looking to the employer's business of mending nets rather than to the work of net-mending as such, for he seems to regard the mending of the nets as a part of the employer's business.

Other reasons for the conclusion that the word "trade" is used in the Trade Boards Act, 1909, to denote the industry, may be found in the statute itself as well as in the consideration of the Schedule of the Act. Thus s. 1, sub-s. 2, of the 1909 Act speaks of the rate of wages prevailing in any "branch of the trade," whereas s. 2 of the same Act, which deals with the establishment of Trade Boards for trades to which the Act applies, speaks of Trade Boards constituted for "any branch of work in the trade"; thus distinguishing the work in the trade, which is the vocational aspect, from the trade itself.

Yet another ground for the view that by trade is meant industry in which there may be many persons of different vocation is afforded by s. 4, which deals with the duties and powers of the Trade Boards. In that section it is provided that Trade Boards may fix minimum rates of wages, so as to apply universally to the trade or so as to apply to any special process in the work of the trade or to any "special class of workers in the trade" or "to any special area." The words "class of workers in the trade" again point to the trade containing more than one class of worker, and the words "special area" seem to me only to have meaning if the trade may be regarded as an industry in an area rather than as a vocation. Further, s. 9 of the same Act provides for any shop-keeper, dealer or "trader," who by way of trade makes any arrangement with any worker, having certain obligations under the Act. The trader here, who by way of trade makes an arrangement, is clearly an employer in a business. It is provided by s. 13, sub-s. 1, of the Trade Boards Act, 1918, that that Act and the 1909 Act are to be read as one; so that the conclusion that the word "trade" points to commercial and not vocational industry in the 1909 Act is equally true of the Act of 1918. In the Act of 1918, the provision that minimum rates may be fixed so as to apply universally to the trade, or to any class of workers in the trade (which I have specifically quoted from s. 4 of the 1909 Act), is amended by s. 3; but the same distinction is drawn between classes of workers and special processes or areas which I have already mentioned, and the same conclusions flow from it.

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(1) [1927] 2 K. B. 220, 227.

There is one provision in the 1918 Act, s. 3, sub-s. 4, which is capable of a construction which supports Mr. Greene's contention, for in that sub-section it is provided that "Where a Trade Board fix a minimum rate so as to apply to any class of workers in a trade they may, if they think it expedient so to do, attach to the fixing of the minimum rate the following conditions; that is to say: (*a*) A condition that workers who are members of the class must be the holders of certificates to that effect issued by the Trade Board; and (*b*) If the class consists of persons who are learning the trade, such conditions as the Trade Board think necessary for securing the effective instruction of those persons in the trade." The latter part of para. (*b*) certainly speaks of the "effective instruction of those persons in the trade," which means, as para. (*a*) shows, workers in the trade; but in my view the whole provision is governed by the consideration that the conditions apply only where a Trade Board fix a minimum wage so as to apply to any class of workers in a trade, and consequently this fourth sub-section is dealing with workers as such and the words "persons in the trade" refer here to workers and afford no guidance as to the meaning of the word "trade" in the legislation as a whole.

Sect. 10 of the Act of 1918, which provides that a Trade Board for any trade may, if they think expedient so to do, make a recommendation to any Government Department with reference to the industrial conditions of the trade, and that the Government Department shall forthwith take the recommendation into consideration, points, I think, to an industry, including places where industry is carried on, for it is not easy to see how this section could apply appropriately to a number of persons serving in different industries who merely share one common vocation. It is significant, though of course by no means conclusive, that in the other two classes of minimum wage legislation now extant—namely, the Coal Mines (Minimum Wage) Act, 1912, which deals with the employment of a workman underground in a coal mine, and the Agricultural Wages (Regulation) Act, 1924, which is an Act to provide for the regulation of wages of workers in agriculture, the industry and not the vocation is the basis of the legislation. In the former case, the place where the workman is employed is the fact which brings him within the Act; in the latter, all workers of whatever craft, so long as they are workers in agriculture, are within the Act.

I now pass to another matter—namely, the consideration of the specific power under which the Minister has here sought to act. For this purpose I do not think it necessary to consider the power to make provisional orders in the Act of 1909, but proceed to deal with the specific power to make special orders which is invoked in this case—a power which first came into existence by virtue of s. 1 of the Trade Boards Act, 1918. It is provided by s. 2 of the 1918 Act that every special order shall, without confirmation by Parliament, have effect as if enacted in this Act, and that such special order may be varied or revoked by a subsequent special order. There is the further usual provision that the order shall be laid before each House of Parliament and that it may be annulled by an address presented to His Majesty by either House within a certain period. The effect of making an order is to cast a duty on the Minister of Labour, if practicable, to establish one or more Trade Boards in accordance with regulations for any trade to which the Acts apply or for any branch of work in the trade. The Trade Boards, in their turn, subject to the provisions of the Acts, either fix a minimum rate or report that it is impracticable, in which case the Minister of Labour may relieve them of their duty. In any event the minimum rate made by the Trade Board needs an order of the Minister to make it obligatory. The draft special order does not therefore, of itself, fix any minimum rates, but is an essential step in the process of setting up a Trade Board, which in their turn fix such rates, subject to confirmation by the Minister.

The draft special order of the Minister may apply the principal Act to any specified trade (which I read to mean a trade which she may specify) to which it does not at the time apply subject to two conditions: (*a*) First, that she should be of opinion that no adequate machinery exists for the effective regulation of wages throughout the trade. I consider this condition first. The words "throughout the trade," coupled with the limitation that the specified trade must not include any specified trade to which the principal Act applies (that is a trade already within the Schedule of the 1909 Act or within a provisional order made thereunder or within a special order already made under the 1918 Act), indicate that the trade throughout which he may consider whether there is adequate machinery for the effective regulation of wages may be a trade wider in industrial extent than that which he ultimately specifies, for it may include parts of the trade which are already dealt with under the 1909 Act or by special order. In the impugned draft special order of the catering trade, the Minister has in fact so followed the directions of

s. 1 of the 1918 Act by excluding in para. 3 (*f*) operations covered by the Trade Boards (Milk Distributive) Order, 1920, and the Trade Boards (Laundry) Order, 1919, but the trade throughout which she has to consider whether there is adequate machinery for the regulation of wages, may well include these parts so excluded from the specified trade. Secondly, (*b*) the Minister must also be of opinion that, "accordingly, having regard to the rates of wages prevailing in the trade or any part of the trade, it is expedient that the principal Act should apply to that trade." It appears from the preamble of the impugned draft special order that the Minister has considered both these matters (*a*) and (*b*), and is of opinion that it is expedient that the Trade Boards Acts should apply to the trade specified in the Appendix. Thus, prima facie, if there be a catering trade, she has come to the conclusion that throughout it no adequate machinery exists for the effective regulation of wages, and she has had regard to the rates of wages prevailing in the trade or any part of it, and is of opinion that it is expedient that the principal Act should apply to it.

We were invited to say that there was no such industry as the "catering trade" for the Minister to consider. I cannot see that the Court has any materials before it on which it can properly come to such a conclusion. Macnaghten J. in the Divisional Court said: "The trade, therefore, must be in existence before any order can be made"—a view which I accept. He continues: "Among the various Associations which are objecting to the order that the Minister proposes to make, are bodies described as 'The North Western Caterers, Ld.,' the 'National Caterers Protection Society' and others." He concludes: "It can hardly, therefore, be doubted that there are persons who carry on the business of catering and they may be said to be engaged in the catering trade." One deponent says that "the Minister cannot create a trade by definition; she can only specify a definite existing trade." This appears to me to be a confusion of thought. The words "to specify" indicate the definition of a species out of a wider genus. The first matter

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for consideration is whether there is a trade whose machinery for regulation of wages and rates of wages prevailing therein may be considered. This may clearly be something wider than the trade which is subsequently specifically defined, because, as I have said, there must be excluded from the specified trade that part to which the principal Act already applies.

From an exhibit containing objections urged before the inquiry, it appears that it was there contended, on behalf of the catering associations which another deponent represented, that it was not expedient that the Trade Boards Acts, 1909 and 1918, should apply to what the affidavit calls the "catering trade." Similarly in para. 5 of the notice of objection so exhibited, it is asked that the "catering trade" should be defined in a certain way. Some at any rate of the evidence of the respondents, therefore, would appear in a general way to recognize a catering trade. In the face of all these facts and in the absence of evidence to the contrary, I am not prepared to hold that there was not in existence, at the time when the Minister made her order, a generic industry which could fairly be called the "catering trade," and I think there are admissions in the evidence that such a trade existed. If so, she may properly consider whether it has throughout it adequate machinery for the effective regulation of wages before she specifies the trade in her order.

As I have indicated, the fact that the draft special order specifies the catering trade in terms narrower than the whole generic trade which the Minister recites that she considered under the 1918 Act does not of itself make it invalid. Indeed, had she defined it so as to include that part of the trade which is covered by existing orders she would have offended against the statute. In *Skinner* v. *Jack Breach, Ld.* (1), in a passage quoted in the Divisional Court, Shearman J. said: "'Specified' does not mean anything which the Minister of Labour chooses to call a trade; a 'specified trade' must be a recognized species of industrial work." Here I think it may fairly be said that the specified trade defined is a species of the genus "catering trade" mentioned in the exhibit of Mr. Booth and other evidence which the Minister had in the first place to consider. But if the learned judge meant to say that the species defined must be coincident with a generic trade first considered by the Minister with regard to machinery and wages, then respectfully I must disagree with him. The generic trade ex hypothesi has not been defined before the Minister considers it, nor can it be; it must always remain a phrase of indefinite denotation.

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(1) [1927] 2 K. B. 220, 229.

I come next to the consideration of the draft order itself, for it may well be, while the Minister may define and specify the trade out of the catering trade at large, as I have stated, that this particular order nevertheless does not comply with the requirements of the Act. Mr. Greene has taken several objections to the draft special order as such, with which I propose to deal. First, he contends that the Minister has defined the trade by reference to the place where it was carried on, with the result that persons engaged in the same occupation are within the Act or outside according to the place where they are working. For example, he says, under the order a member of an orchestra would be within the operation of the Act while performing in a restaurant and outside it when engaged in an orchestra at a theatre.

In the *Board of Trade* v. *Roberts* (1) a workman was engaged primarily as an errand boy with occasional employment in the tailoring trade. A Board was established by the Board of Trade on November 23, 1910, for those apprentices of the ready-made and wholesale bespoke tailoring trade in Great Britain who were engaged in making garments to be worn by male persons, and the Board fixed minimum time rates of wages for male and female workers in the said trade. The Court had to construe the details of this order of the Trade Board, which do not here concern us, but in his judgment Lord Reading C.J. said (2): "If he" (the workman) "is occupied in fact for part of the time as messenger, or warehouse assistant, and for part of the time in the tailoring trade doing other work than that of a messenger or warehouse

(1) (1915) 113 L. T. 739.

(2) 113 L. T. 742.

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assistant, then it seems to me that he must be paid a wage which will work out at not less than the minimum rate for the time during which he has been employed, that is occupied, in a branch of the tailoring trade. I cannot read this Act and the order passed in consonance with it, without being driven to the conclusion that the Legislature meant that no one should do work in a branch of the tailoring trade which may properly be described as tailoring of one kind or another, even though it might not be skilled work, without being paid at least the minimum rate prescribed in the order." Now in that case it would appear that the workman, vocationally considered as a craftsman, was at one moment a messenger, at another a warehouse assistant, and at yet another a tailoring assistant. But the words of Lord Reading seem to indicate that the uncertainty of his employment from minute to minute was no reason for not applying the Act on the ground that he was employed in the tailoring trade. The argument of Mr. Greene on this head is, I think, bound up with the argument which I have already rejected that the trade is to be regarded with reference to the vocations of those who practise it, rather than from the point of view of the industry itself. The catering trade, by its very nature, is one in which, apart from cooking and preparation of meals, little or no manufacture is carried on, and I cannot see why that commercial industry or trade may not have as its common basis the carrying on of work in particular places: the provision of food may well necessitate it.

Inasmuch as by s. 2, sub-s. 1, of the 1918 Act, a special order, not a draft special order, but one which Parliament has not taken steps to annul, may be varied or revoked by a subsequent special order, I think we are entitled to consider special orders already made and now having the force of law as an assistance in ascertaining the meaning of the 1918 Act. There are at least two special orders which have been made under the Act of 1918, thus now having the force of law, inasmuch as they are to be deemed to be part of the Acts, which already have reference to the place where the trade is carried on. The first is the Trade Boards (Toy Manufacturing)

Order, 1926 (Statutory Rules and Orders, 1926, No. 24), which specifies the toy manufacturing trade as "all work in connection with the making of children's toys when performed:—(*a*) in a toy making establishment or in a perambulator making establishment, or (*b*) in any other establishment by a worker who during the whole time that he works in any week in such other establishment is wholly employed on such work." The Order goes on to define a toy making establishment and also a perambulator making establishment in much the same manner as the term "catering establishment" is defined in the present order.

Another is the Trade Boards (Grocery and Provisions) Order, 1920, which applies to the retail sale of the articles specified in the Appendix in or in connection with certain establishments, offices, branches or departments.

As I have said, by s. 2, sub-s. 1, of the 1918 Act, every special order may be varied or revoked by a subsequent special order, and, if the argument which is addressed to us is correct, that an industry may not be defined by reference to the place where it is carried on, it would appear that these two Orders which are now law cannot be varied or revoked by subsequent special order which varies the Orders by reference to the place where they were carried on, or that at any rate the Minister might be prohibited from making such a subsequent special order, because it would have to specify a trade by reference to a place of business, and such a trade, ex hypothesi, ought not to have been within the Act, and was only legalized by the inertia of Parliament. But, apart from these considerations, I can see no reason why an industry should not be defined by reference to the place where it is carried on, nor why persons engaged in the same occupation should not be within the Act or outside it, according to the place where they were working. If the argument is one of inconvenience, the Trade Boards, which may be set up under the impugned order, have ample power to exclude special classes of workers or special areas from any minimum wage, and it may be observed that under the Coal Mines (Minimum Wage) Act, 1912, a carpenter working on pit props in a coal mine will be within the Act, whereas if he works at the surface he will not. The same is true of the miner himself if he is working on surface work. His position will be no different from that of a member of an orchestra employed in a restaurant or in a theatre.

Next, it was said that the order was bad, because the definition by reference to a trade involved the bringing in of a number of occupations whose collocation was fortuitous, and which could not be said to be branches of one unit. This argument again depends on what I believe to be a fallacious view of the meaning of the word "trade" in the statute. The collocation of the workers in the catering establishment is not fortuitous if they be regarded from the point of view that they have the common quality of doing work performed in or in connection with a catering establishment. The Grocery and Provisions Order, 1920, to which I have already referred, deals with the retail sale of many classes of goods, and includes many operations, such as checking, testing, weighing, time-keeping and clerical work, sixteen examples in all of existing different operations which have this in common, that they are incidental to or carried on in connection with the sales of the subjects mentioned in the Order. These phrases are substantially repeated when applied to the subject matter of the impugned order.

Further, it was objected that the definition by reference to a place was itself fluid in the sense that it applied to the class of operation which might be carried on at a particular moment in that place. The class of operation, it was argued, under the order might vary in any particular case from day to day, from week to week, and from month to month. The place itself might be subdivided so that, of persons performing identical work in the same undertaking, some would be within the Act and others would be outside it, and that a particular employee would be within or outside the Act according to the particular part of the premises in which he might be employed at a particular moment. All these contentions appear to me to disregard the structure and intention of the Trade Boards Acts. The erection of Trade Boards, with all the elasticity provided for meeting special circumstances, points to the making of special orders in wide terms under which specialized Trade Boards Orders fixing rates may function. If the arguments are valid they appear to me to make it wellnigh impossible to administer the Act at all, and to reverse the whole practice as derived from the Orders, both provisional and special, as confirmed or allowed by Parliament. They are arguments based upon convenience rather than objections taken on the ground of the orders being ultra vires, and, although in the judgment of Avory J. there is reference to uncertainty, there is nothing, as it appears to me, in the relevant sections of the two Acts to limit in any way the power of the Minister to define the area or conditions within which Trade Boards may be set up, once she has taken into consideration the matters which she is required to consider and once it is established that there is in existence a trade which is the fit subject of her consideration. But so far as the matter is one where convenience may be regarded it seems to me that, after an order has been made, the fact that the Trade Board may report that the making of an order is not practicable, and the power to exclude classes of workers, or areas, or processes, are reasons for coming to the conclusion that the Legislature did not intend the Minister in making the order to be fettered by questions of convenience, but that, when the order has been made, the Trade Board must consider all such matters, and the Minister, in her turn, may consider them, when she comes to the question of confirming an order made by a Trade Board.

As a guide to the construction of the Acts, it is to be noticed that in the power given to the Minister under s. 1 of the 1918 Act there is no reference to practicability, classes of persons, process or area, such as appear when the functions of Trade Boards are being defined, and I do not think that we are justified in reading limitations into the language of the section dealing with special orders, which are only to be found in that part of the Act which deals with Trade Boards as such. Existing special orders such as the Grocery and Provisions Trade Order, which is already law, also deal with places, and are fluid in the sense that they apply to classes of operation which may be carried on at a particular moment and not at another. Thus, in the Appendix to the Grocery and Provisions Trade Order, to take one example, the retail sale of specified articles in or in connection with any establishment or business or branch or department is within the Order when the retail sale of one or more of such articles is the "main or principal" business or branch or department but not otherwise: see Appendix, s. 1 (*b*). So also in para. 2 of the same Appendix the wholesale sale of any articles specified in Sch. II. or in connection with any establishment or business or branch or department in which such sale is the "main or principal business" of that establishment, may be the subject of Trade Board regulation. In my view, to hold that this order is bad for uncertainty would necessitate the view that the Grocery and Provisions Trade Order, which this order so largely follows, would also be bad if it had not been sanctioned by Parliament. Now that Order is law, and I have already pointed out the difficulties which arise if it be held that, by definition of place or fluidity, a special order now made would be bad which nevertheless, under s. 2, sub-s. 1, of the 1918 Act, might be varied or revoked by subsequent special order.

Finally it was observed in the Divisional Court that the special order was bad because the specified trade excluded certain parts of the catering trade as there specified. I do not take this view. Once it is concluded that the Minister is empowered to define a species—may specify by order within the wider genus of the catering trade at large—it appears to me that definition by exclusion is as much within the power of the Minister as definition by inclusion. By the Trade Boards (Provisional Orders) Confirmation Act, 1913, the trade of shirtmaking, for which a provisional order had been made under the Trade Boards Act, 1909, received legislative confirmation. That provisional order, in defining the trade, in terms excluded articles which were "knitted or made from knitted fabrics." By s. 1, sub-s. 5, of the 1918 Act, any Act confirming a provisional order made in pursuance of s. 1 of the principal Act may be repealed or varied by a special order. If a special order cannot define by exclusion from the whole genus of the trade, the same problem would arise were it sought by special order to vary a provisional order which had been confirmed, and so had become law, which itself excluded certain articles; particularly if such variations by special order were by way of exclusion.

I have therefore come to the conclusion that the Minister was entitled to make this draft special order; in the respondents' own affidavits there is evidence that there was in existence at the time of the making of the special order a generic commercial industry known as the catering trade; there is no evidence that the Minister did not duly consider the matters in that trade which s. 1 of the 1918 Act requires her to consider before she makes a draft special order; the draft special order was duly inquired into after proper notice in the manner provided by the Act. In my opinion it duly specified both by inclusion and exclusion the trade with which the Minister proposed to deal, and the Minister may properly now lay that draft special order before each House of Parliament, as provided in s. 2 of the Act of 1918.

On this view, the second prohibition with regard to making of other special orders does not arise; it appears to me to have become an academic question, but if there be any matter to be discussed, I would say that I agree with the judgment of Scrutton L.J. on this point.

I am of opinion that these appeals should be allowed and the rules of prohibition discharged.

Appeals allowed.

Solicitor for the appellant: *The Solicitor to the Ministry of Labour.*

Solicitors for National Trade Association: *Godden, Holme & Ward.*

Solicitors for Incorporated Association of Purveyors of Light Refreshments: *Samuel Tonkin, Booth & Co.*

Solicitors for Strand Hotels, Ld.: *Bartlett & Gluckstein.*

W. H. G.

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April 20, 21, 22, 23; *May* 6, 7; *June* 8.

MERSEY DOCKS AND HARBOUR BOARD (Occupiers) *v.* ASSESSMENT COMMITTEE FOR WEST DERBY ASSESSMENT AREA AND BOTTOMLEY (Revenue Officer).

BOTTOMLEY (Revenue Officer for West Derby Assessment Area) *v.* WEST DERBY ASSESSMENT COMMITTEE AND MERSEY DOCKS AND HARBOUR BOARD (Occupiers).

MERSEY DOCKS AND HARBOUR BOARD (Occupiers) *v.* ASSESSMENT COMMITTEE FOR WEST DERBY ASSESSMENT AREA AND BOTTOMLEY (Revenue Officer) (No. 2).

BOTTOMLEY (Revenue Officer for West Derby Assessment Area) *v.* WEST DERBY ASSESSMENT COMMITTEE AND MERSEY DOCKS AND HARBOUR BOARD (Occupiers) (No. 2).

SAME *v.* SAME (No. 3).

BOTTOMLEY (Revenue Officer for West Derby Assessment Area) *v.* WEST DERBY ASSESSMENT COMMITTEE AND LIVERPOOL GRAIN STORAGE AND TRANSIT COMPANY, LIMITED (Occupiers).

SAME *v.* SAME.

Rating—Valuation—Freight-transport Hereditament—Warehouses, bonded and other—Dock Authority—User for Dock Purposes—Business of Shipping and Unshipping—User for Transport Purposes—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *ss.* 1, 5, 6.

Special Case—Decision of Divisional Court—Time for Appeal—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 31, *sub-s.* 5*—Rules of the Supreme Court, Order* lviii., *r.* 15*—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 225.

By s. 1, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, "freight-transport hereditaments" are to be distinguished from other hereditaments in valuation lists. By s. 5, sub-s. 1, "freight-transport hereditament" means a hereditament occupied and used wholly or partly for "dock purposes" as part of a "dock undertaking" being an undertaking whereof a substantial proportion of the volume of business is concerned with the shipping and unshipping of merchandise not belonging to the undertakers. By s. 5, sub-s. 2 (*c*), "Dock purposes" means all purposes connected with the shipping or unshipping of merchandise at a "dock." By s. 5, sub-s. 3, "Dock" includes any harbour, wharf, pier, jetty or other works in or at which vessels can ship or unship merchandise or passengers not being a pier or jetty primarily used for recreation. "Dock undertaking" means an undertaking carried on by a dock authority, but also includes any other undertaking comprising as part thereof a dock so far as its business is carried on at and in connection with the dock. By s. 6, sub-s. 1, a freight-transport hereditament occupied and used wholly for transport purposes shall be shown in the valuation list as being so occupied and used, and the net annual value of every such hereditament occupied and used partly for transport purposes shall be shown as being apportioned between the occupation and user for transport purposes and the occupation and user for other purposes. By s. 6, sub-s. 3, the hereditament is to be deemed to be occupied and used for transport purposes, except in so far as it is occupied and used for the purposes of a dwelling-house, hotel, or place of public refreshment; provided that in the case of a hereditament occupied and used for dock purposes as part of a dock undertaking no part of the hereditament being a building or yard or place primarily occupied and used for warehousing merchandise not in the course of being transported shall be deemed to be occupied and used for transport purposes.

Of seven warehouses occupied by dock authorities Nos. 1, 2, and 3 were bonded warehouses. No. 1 was used for tobacco; No. 2 for tobacco and sugar, and No. 3 for tobacco, sugar, and wine and spirits. The tobacco arrived at the port under bills of lading by which it was deliverable "to King's"—i.e., to bonded "warehouse at owner's risk but ship's expense." By the custom of the port the costs of landing on the quay, weighing, and cartage to the warehouse are paid by the shipowner, who notifies the dock authority of his lien on the goods for any freight unpaid. Subsequent charges are paid by the consignee. One warehouse rate charged includes warehouse accommodation for one year; an alternative and smaller rate includes accommodation for six months. In due course the owner of the goods presents a delivery order signed by the shipowner and addressed to the dock authority, and upon satisfying the Customs duty obtains the goods. Of the tobacco taken into Warehouse No. 1 one half remains for more than a year and four-fifths for more than six months.

Sugar in bags is discharged from the ship, some into carts paid for by the consignee and some on the quay floor of the warehouse. The charge for landing on the quay or into carts is paid by the shipowner. Subsequent charges are paid by the consignee. Three-fifths of the mixed goods, tobacco and sugar, remain for more than three months in Warehouse No. 2.

Wine and spirits are discharged on the quay by stevedores paid by the shipowner who deliver the goods to a master porter paid by the consignee. After being separated to bill of lading marks and collected on the quay, the goods are gauged and sampled by Customs officers and carted to the warehouse. Of the mixed goods brought to

Warehouse No. 3, 65 per cent. remain there for more than three months :—

Held, by Scrutton L.J. that these warehouses were not freight-transport hereditaments.

By Greer L.J. that the warehouses were occupied and used partly for dock purposes as part of a dock undertaking and were freight-transport hereditaments within s. 5; that once within s. 5 they could not be entirely excluded by proviso (*b*) to s. 6, sub-s. 3, and that their rateable value ought to be apportioned between their occupation and user for transport purposes and their occupation and user for other purposes.

By Slesser L.J. that, as no part of the hereditaments was primarily occupied and used for warehousing merchandise in the course of being transported, there was no room for apportionment.

Warehouse No. 4 was a warehouse for wool, which is discharged from the importing ship by stevedores paid by the shipowner and by them delivered to porters who load the bales upon waggons of the dock authority. The bales are carted to and deposited in the warehouse, where they are sorted, sampled, graded, weighed, and numbered, and left open for inspection. The charges for loading on waggons, cartage and subsequent services in the warehouse are paid by the consignee. Of the wool taken into the warehouse two-thirds goes out in a month and 85 per cent. in two months. It is sold from samples or after inspection in the warehouse.

Held, per Curiam, that this warehouse was not a freight-transport hereditament.

Warehouse No. 5 was a warehouse for grain, which is discharged in bulk from the importing ship or from lighters into elevators which convey it to the warehouse. The elevators are partly used for shipping and unshipping. The dock authority charge three alternative rates; one of these covers warehouse accommodation for three days, a second and higher rate allows six days, and there is a third which is a weekly rate. Of the grain taken into this warehouse 65 per cent. goes out in a month and 85 per cent. in two months.

Warehouses 6 and 7 were two grain warehouses occupied and used by a dock authority and consisting of a ground floor and top floor, the intermediate space being occupied by silos. The grain arrives in bulk by ship or lighter at docks alongside the warehouses, and is discharged by means of elevators which take it to transit silos, where it is weighed and then carried by travelling bands to any part of the silos or floors of the warehouses. The grain rarely remains in the transit silos, but is passed on to the warehouses, from which it is delivered as and when required. It is discharged into ship or lighter by means of the travelling bands, which convey it back to the transit silos. Of the grain received one-third goes out by water; the rest by road or railway; 65 per cent. has been forwarded at the end of one month, and 84 per cent. at the end of two months. The dock authority derive 62 per cent. of their revenue from charges for receiving, weighing, stevedoring, porterage and delivery, and 33 per cent. from charges for storing and warehousing.

The Court of quarter sessions having in each of these three cases held that the warehouse in question was occupied and used for purposes connected with the shipping and unshipping of merchandise at a dock and for warehousing merchandise in the course of being transported and not primarily for warehousing merchandise not in the course of being transported, and the Divisional Court having affirmed these decisions, the Court saw no reason for reversing the decisions of the Divisional Court.

Held, by Scrutton and Slesser L.JJ., dubitante Greer L.J., that an appeal from an order of a Divisional Court upon a case stated under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, is made in a "matter not being an action" within the meaning of Order LVIII., r. 15, of the Rules of the Supreme Court, inasmuch as the matter is commenced before the Assessment Committee and so is not commenced by writ or in manner prescribed by Rules of Court within the meaning of s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925. Therefore the time for appealing from the order is fourteen days from the time when the order is signed, entered, or otherwise perfected, and not from the time when it is made (unless it is made and perfected on the same day).

MERSEY DOCKS AND HARBOUR BOARD (OCCUPIERS) v. ASSESSMENT COMMITTEE FOR WEST DERBY ASSESSMENT AREA AND BOTTOMLEY (REVENUE OFFICER). (1)

APPEAL by the Occupiers from the decision of a Divisional Court upon a case stated under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, by the Recorder of Liverpool at the instance of the Occupiers, who appealed from the decision of the West Derby Assessment Committee excluding from the special list for the Rating Area of the City of Liverpool the hereditament hereinafter mentioned on the ground that it was not a freight-transport hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928. (2)

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(1) This and the six following appeals were heard together.

(2) Rating and Valuation (Apportionment) Act, 1928, s. 1:

"(1.) In every valuation list the classes of hereditaments hereinafter mentioned shall, in the prescribed manner, be distinguished from each other and from all other hereditaments, that is to say, there shall be so distinguished— . . . .

(c) freight-transport hereditaments; and where by this Act the net annual value of any such hereditament is required to be apportioned such apportionment shall be shown in the

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The hereditament consisted of the Stanley Warehouses and appurtenances, Stanley Dock, Liverpool.

2. The following facts were admitted or proved :—

(A) Benjamin Green Bottomley is the Revenue Officer for West Derby Assessment Area.

(B) The hereditament consists of a block of warehouses situate on the south side of the Stanley Dock, Liverpool. It comprises (1.) the principal warehouse known as the Stanley Tobacco Warehouse, which contains a basement, quay, and twelve upper floors specially constructed for the storage of tobacco, and is capable of storing 75,000 casks ; (2.) two smaller blocks of warehouses, one on the North side of Stanley Dock and one to the South of the Stanley Tobacco Warehouse, which together are capable of storing 38,000 casks ; (3.) an annexe to the South Block which is

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prescribed manner in the valuation list."

Sect. 5: "(1.) In this Act the expression 'Freight-transport hereditament' means all or any of the following hereditaments :—

. . . . (c) A hereditament occupied and used wholly or partly for dock purposes as part of a dock undertaking being an undertaking whereof a substantial proportion of the volume of business is concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers :

Provided that a hereditament primarily occupied and used as offices for, or for purposes ancillary to, the general direction and management of a . . . . dock undertaking, shall not be deemed a freight-transport hereditament.

(2.) In this Act the following expressions have the meanings hereby respectively assigned to them :—

. . . . (c) 'dock purposes,' that is to say, all purposes connected with the shipping or unshipping at a dock of passengers and their luggage, or of carriages, parcels or merchandise, or the conveyance or transport thereof by a railway forming part of a dock undertaking, including the construction, maintenance and repair of all ways, works, machinery and plant used in connection with the undertaking, or connected with the provision of accommodation for vessels and their stores, equipment and tackle (including fishing tackle), whether for purposes of repair or otherwise.

(3.) In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say—

. . . . 'Dock' includes any harbour, wharf, pier, jetty or other works in or at which vessels can ship or unship merchandise or passengers not being a pier or jetty primarily used for recreation :

'Dock undertaking' means an undertaking carried on by a dock authority, but also includes any other undertaking comprising as part thereof a dock in so far only as capable of storing 4500 casks. The hereditament is a bonded warehouse, and is available and used solely for the accommodation of goods passing through the port of Liverpool. During the year 1928 (which was the period taken for the purposes of this case) the hereditament was used for the accommodation of tobacco.

(C) The hereditament and the other warehouses of the Occupiers on the Dock Estate were and are occupied solely for the purpose of facilitating the passage of goods of all classes through the port, and preventing congestion on the quays and delay to vessels using the port, and in connection with the shipping or unshipping of goods.

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its business is carried on at and in connection with that dock:

'Dock authority' means any person or body of persons, whether incorporated or not, who are authorized to construct or are owners or lessees of any dock authorized by or under any Act:"

Sect. 6: "(1.) In every valuation list every freight-transport hereditament, which is occupied and used wholly for transport purposes shall be shown as being so occupied and used, and as respects every such hereditament occupied and used partly for transport purposes the net annual value thereof shall be shown in the prescribed manner as being apportioned between the occupation and user of the hereditament for transport purposes and the occupation and user thereof for other purposes.

(2.) Where a freight-transport hereditament is not occupied and used for more than one transport purpose the nature of that purpose shall be shown, and where a freight-transport hereditament is occupied and used partly for one transport purpose and partly for either or both of the other transport purposes, the proportions of the net annual value of the hereditament attributable to the occupation and user thereof for the several transport purposes shall be distinguished.

(3.) For the purpose of determining in what proportions a freight-transport hereditament is occupied and used for transport purposes and for other purposes, respectively, the hereditament shall be deemed to be occupied and used for transport purposes, except in so far as it is occupied and used for the purposes of a dwelling-house, hotel, or place of public refreshment:

Provided that—

(*a*) no part of a freight-transport hereditament which is so let out as to be capable of separate assessment shall be deemed to be occupied and used for transport purposes unless it is actually so occupied and used; and

(*b*) in the case of a hereditament . . . . occupied and used for dock purposes as part of a dock undertaking no part of the hereditament, being a building, yard, or other place primarily occupied and used for warehousing merchandise not in the course of being transported, shall be deemed to be occupied and used for transport purposes."

(D) Instead of paragraph D as originally drafted, the following Addendum was substituted by agreement between all parties concerned.

ADDENDUM.

D A. (*a*) *Tobacco in Cask.*

(i.) Tobacco is imported into the Liverpool Docks on bills of lading which provide that it is "to be delivered to King's warehouse at owner's risk but ship's expense." It is discharged from the ship by a master stevedore, who is paid by the shipowner, and landed on the quay into the custody of a master porter, who is also paid by the shipowner and who may be the same person as the master stevedore. The charge made to the shipowner by the master stevedore is a matter of arrangement between them and is not known to the Occupiers. The casks while being landed are checked by the master porter with the master porter's extract from the ship's manifest. The casks are not selected to marks on the quay. Where the casks have been allocated to different warehouses, which is done when the merchant desires to have his consignment in a particular warehouse for insurance or other purposes, or where the Occupiers find it necessary having regard to the accommodation available in the warehouses, then the casks are stowed or piled according to their warehouse allocation. For example, if there were 200 casks to go to the Stanley Warehouses, and these casks were owned by different consignees, the casks would not be separated into the different owners' lots on the quay but would remain mixed up until sorted in the warehouse. This practice may be departed from if the quay is in a congested state, no allocation to warehouse piles being then possible. The master porter, after receiving the casks on the quay, and for a payment of 4*s.* per ton received from the shipowner, weighs them singly in most cases. The shipowner passes a landing and conveying entry at the Custom House, and the Customs officers then permit the tobacco to be removed from the quay. Before, however, the shipowner takes his landing and conveying entry to the Custom House he is required to produce it to the Occupiers' Rates and Dues department to be stamped, and this is done on a general undertaking given by the particular shipowner to the Occupiers that if the consignee fails to pay within seven days the dock rates on the tobacco, the shipowner will himself become responsible for the charge. The master porter delivers the casks, after they have been stowed on the quay, to vehicles engaged and paid for by the shipowner. The vehicles convey the casks to the warehouse. The cartage rates are a matter of private contract between the shipowner and the master carter.

(ii.) The casks of tobacco are lifted from the vehicles by the Occupiers' employees, and the rates on pp. 88 to 94 of the Warehouse Rate Book, which are paid by the consignee, then come into operation as necessary. Instructions in writing are received by the Occupiers from the consignee to receive and to weigh net or gross and, if desired, to sample and screw. Before the consignee can have the tobacco weighed in the warehouse he must pass a warehousing entry at the Custom House. During the receipt of the tobacco into the warehouse the shipowner notifies the Occupiers in writing that he has a lien on the tobacco pending production of bills of lading and payment of freight, and in some cases he instructs the Occupiers that the tobacco is to be stored in the shipowner's name and held to his order. In all cases the tobacco is entered in the Occupiers' cargo ledger in the name of the consignee, and an entry in red ink is made in the ledger of the shipowner's claim to a lien. About 79 per cent. of the tobacco received into the Stanley Warehouses [77 per cent. in the case of the Wapping Warehouses; 80 per cent. in the case of the Albert Warehouses] is received under the consolidated rate; the remainder is dealt with under the Transitu rates. The following operations are covered by the consolidated rate:—

> Receiving, weighing net, sampling at the time of weighing, ordinary coopering, housing, furnishing certificate of damage, rent for the first year—35*s*.

Receiving, weighing gross, ordinary coopering, housing, rent for the first year—24*s*.

Receiving is the operation of unloading from the vehicle by warehouse crane or jigger and stowing on the receiving grounds. There are set apart in this warehouse certain areas upon which the casks are received, sorted, and temporarily stowed ; at times of pressure additional areas are used for these purposes as required. The normal area is for the Stanley warehouses about 1200 square yards divided between the basement and the ground floors [for the Wapping Warehouses 1600 square yards divided between the first and third floors ; for the Albert Warehouses 1750 square yards on the ground floor], but this area varies from time to time. In stowing the casks upon the receiving grounds they are sorted between the various consignees. Before the casks can be removed from the receiving ground, the warehousing entry passed by the consignee with the Customs Authorities has to be received by the Customs Officer stationed at the warehouse, and from this document is prepared the entry in the Customs weighing book showing the name of the consignee, the ship's name, the Customs rotation number, and the marks already on the cask, and also the new serial numbers allocated to the casks on an outside quay.

(iii.) After the Import Books have been prepared, the casks are removed to the weighing floor, which is an area set aside on one of the floors in each warehouse [the second floor in the case of the Albert and Wapping Warehouses]. In weighing net, the casing is removed from the tobacco, and at the time of weighing a sample is taken from three parts of the contents of the casks. The net weight is recorded by the officers of the Customs and by those of the Occupiers in the Import Weighing Books ; the casing is then replaced and coopered, and the cask is removed from the weighing area or floor and housed, that is, stowed or piled. A Remarks Account is made out for each consignee's cask after weighing, and is furnished to the consignee. In addition a Weighing Net Account, giving details of the weights, is issued to the consignee. During the course of weighing, whether net or

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gross, the marks on the casks which indicate the grade of the tobacco are carefully scrutinized. It is not possible for this scrutiny to be made during the receiving operations, as it would impede them. Should any discrepancy be observed between the mark on a cask and the particulars furnished in the consignee's receiving order, the attention of both the shipowner and the consignee is drawn thereto and the consignee inspects the tobacco. If he is satisfied that it is of the quality he is expecting to receive, he gives the Occupiers a letter agreeing to accept the cask. The Occupiers require this letter to be countersigned on behalf of the shipowner. If the consignee is not satisfied with the cask and refuses it, it is entered in the Occupiers' ledger on the ship's account. Where during the net weighing the tobacco is found by the Occupiers' sampler to be badly damaged, the attention of the shipowner and the consignee is called to the damage by telephone communication and the weighing of that particular cask is suspended to allow both parties to attend and inspect. The liability for the damage is settled between the shipowner and the consignee, and the tobacco is sometimes surveyed on behalf of the parties by independent persons. The Occupiers do not proceed with the weighing of that particular cask until they are instructed to do so by the consignee. A certificate of damage is issued by the Occupiers to the consignee in all cases of damage with an indication of the nature of the damage, whether it is damage by sea or what is known as country damage, that is damage done before shipment by faulty curing, packing, or the like. On the certificate the consignee takes such steps as he may be advised to recover the damage. In weighing gross the cask is not removed from the tobacco, nor are samples taken. The cask is put on the scale and a record of the gross weight is made. The cask is coopered if necessary, and then removed to its stowage ground, which may be any available area in the building. No Remarks or Damage Accounts are issued. After the casks have all been stowed, the receiving orders provided by the consignee are endorsed by the Occupiers' officials with particulars of the casks received and with a

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statement whether they are under or over 900 lbs. each net with a view to the rates for hogsheads and tierces respectively set out on p. 88 of the rate book. The receiving orders are then forwarded by the warehouse keeper to the Head Office of the Occupiers, where the charges, including a year's rent, are computed and entered in the ledger, and bills are made out and sent to the consignee. The shipowner does not pay to the Occupiers any part of the consolidated rate, nor does he pay to the consignee any contribution in respect thereof. In due course the consignee produces a delivery order signed by the shipowner and addressed to the Occupiers in favour of the consignee. This has the effect of removing the stop placed upon the goods by the shipowner at the time of their receipt into the warehouse, and until the delivery order is presented the consignee cannot get delivery of the tobacco.

(iv.) The consolidated rate does not include any charge for delivery ex warehouse, which is a separate charge or rate payable on delivery and appears on p. 88 of the rate book under the heading of "General Rates." The rates set out on pp. 88 and 89 under the heading of "General Rates other than Transitu Rates" are for extra services not included in the consolidated rate or the Transitu Rate. The Transitu Rate includes four weeks' rent. This rate, if desired, must be expressly demanded. Provided that the casks are not sampled, the tobacco may remain indefinitely under the Transitu Rate at a weekly rental. If however any cask is sampled under the rate and is not removed within four weeks from the date of receiving, the cask becomes subject to the consolidated rate on p. 88, and this rate is retrospective to the first date of the receiving of the shipment. The Transitu Rate is paid by the consignee.

D A. (*b*) *Tobacco in Bales and Cases.*

Tobacco in bales and cases forms about 9 per cent. of the total imports of tobacco. The bills of lading for bales and cases do not contain any provision putting upon the shipowner the duty of delivering to King's warehouse. It is discharged from a ship by the master stevedore, who is paid by the shipowner, and is landed on the quay into the custody of a master porter, who may be the same person as the master stevedore. The master porter's rate of 4*s*. per ton is paid by the consignee and is usually subject to a deduction of 10 per cent., because the master porter does not weigh the bales and cases on landing. The bales and cases are sorted to marks on the quay, if required, but if the whole consignment in the ship is for delivery to one of the Occupiers' warehouses, the master porter may not separate them to marks. The rate of 4*s*. above referred to covers in addition to sorting to marks the operation of receiving from ship, stowage on the quay, and delivery therefrom to vehicles engaged and paid for by the consignee. As the bales are not weighed on the quay, the Customs regulations provide that a Customs cart-follower shall be in attendance, the cost of his attendances is borne by the consignee. The vehicles convey the bales and cases to the Occupiers' warehouses. The freight is generally prepaid, and the Occupiers do not receive notices of lien from the shipowner. The operations in the warehouse and the issue of accounts, etc., are the same as for casks, except that the shipowner is not responsible for delivery to the warehouse [and, in the case of the Albert warehouses, that the weighing takes place on a portion of the first floor]. All the rates in the rate book shown on pp. 89 and 90 are paid by the consignee. The explanation of the Transitu Rates on casks applies equally to bales and cases. The other descriptions of tobacco shown on pp. 91 to 94 form a negligible percentage of the import trade.

(E) No goods are received by the Occupiers into any of their warehouses unless they have been shipped to the port of Liverpool or are about to be shipped from that port.

(F) The Occupiers are a statutory undertaking established by the Mersey Docks and Harbour Board Act, 1857. The members of the Board serve without remuneration. Their duties are to manage the port and (except in special cases which have no bearing on this case) to apply the revenue solely to purposes which conduce to the safety or convenience of ships frequenting the port of Liverpool or facilitate the shipping or unshipping of goods and to the discharge of a debt contracted for the above purposes. The total value of goods passing through the port of Liverpool in 1928 was 485,386,000*l.*, of which 12,207,000*l.* or 2½ per cent. passed through the Occupiers' warehouses.

(G) The Occupiers are a Dock Authority carrying on a dock undertaking within the meaning of s. 5 of the Rating and Valuation (Apportionment) Act, 1928.

(H) There are annexed hereto as part of this case (i.) a schedule marked A showing the tonnage warehoused in the hereditament and the length of time such tonnage remains in the hereditament; (ii.) a plan marked B showing the estate of the Occupiers and the situation of the hereditament; (iii.) a handbook of the Liverpool warehouse rates and charges marked C showing the rates and charges applicable to the tonnage in the hereditament; (iv.) a graph marked D showing in terms of percentage the rate of disposal of goods stored in the hereditament during the year 1928; and (v.) a plan of the hereditament marked E[4]. The graph D showed that over 50 per cent. of the tobacco taken into the warehouses remains there for more than a year, and over 80 per cent. for more than six months.

3. The Occupiers contended:—

(*a*) That the hereditament is a freight-transport hereditament within the meaning of s. 5 of the Rating and Valuation (Apportionment) Act, 1928, by reason of the facts that they are a dock authority authorized to construct docks and are the owners of docks authorized by the provisions of the Mersey Docks and Harbour Boards Acts, 1857 to 1928, and that the hereditament is occupied and used by the Occupiers wholly or partly for such purposes as part of their dock undertaking, being an undertaking whereof the whole or a substantial part of the whole of the business is concerned with the shipping or unshipping of merchandise not belonging to or intended for the use of the Occupiers.

(*b*) That the hereditament is not a building, yard, or other place primarily occupied or used for warehousing merchandise not in the course of being transported.

(*c*) That the hereditament is primarily occupied and used by the Occupiers as a dock authority or for purposes connected with or incidental to the shipping and unshipping of goods and the warehousing of goods in the course of being transported.

(*d*) That on the true construction of ss. 5 and 6 of the Act the hereditament, regard being had to the purpose of its use and occupation, is a freight-transport hereditament occupied and used for transport purposes.

(*e*) That upon the facts the hereditament is a freight-transport hereditament occupied and used for transport purposes.

4. The Revenue Officer contended :—

(*a*) That the hereditament is not a freight-transport hereditament within the meaning of s. 5 of the Rating and Valuation (Apportionment) Act, 1928.

(*b*) That the hereditament is not a freight-transport hereditament in that it is not occupied and used wholly or partly for dock purposes, as part of a dock undertaking, or for dock purposes within the meaning of the said section.

(*c*) That the hereditament is not a dock within the meaning of the said section.

(*d*) That the hereditament is not used for dock purposes and is primarily occupied and used as a bonded warehouse for the purposes of the business of wharfingers and warehousemen.

(*e*) Alternatively :—

(i.) That the hereditament should not be deemed to be occupied and used for transport purposes by reason of the proviso to s. 6, sub-s. 3 (*b*), of the Act, inasmuch as it consists of buildings, yards, or other places primarily occupied and used for warehousing merchandise not in the course of being transported.

(ii.) That the merchandise taken to the hereditament has arrived at the destination to which it was consigned, and that it is there warehoused for the consignees' convenience.

(iii.) That the hereditament is occupied and used not for transport purposes but as a bonded warehouse, and that the Occupiers carry on there the business of wharfingers and warehousemen.

(*f*) Further, if contrary to the contention of the Revenue Officer the hereditament is a freight-transport hereditament, the Occupiers failed to discharge the onus which lies upon them of proving that, although the hereditament was occupied and used for dock purposes as part of a dock undertaking, no part of it is a building, yard, or other place primarily occupied and used for warehousing merchandise not in the course of being transported.

5. In so far as it was a question of fact the Recorder found that the hereditament was primarily occupied and used for the purposes set out in paragraph 2 above and that no part of it was primarily occupied and used for warehousing merchandise not in the course of being transported. In so far as it was a question of law or of mixed fact and law he was of opinion on the facts set out in paragraph 2 that the hereditament was occupied and used for purposes connected with the shipping or unshipping of merchandise at a dock and for warehousing merchandise in the course of being transported, and was not primarily occupied and used for warehousing merchandise not in the course of being transported. He was also of opinion that the occupation of the hereditament was ancillary to the purpose of shipping and unshipping goods at a dock. He therefore decided in favour of the Occupiers and allowed the appeal.

6. The question for the opinion of the Court was whether upon the above facts the Recorder came to a correct determination and decision in point of law.

The Divisional Court (Lord Hewart C.J. and Avory and MacKinnon JJ.) reversed the order of the Quarter Sessions and allowed the appeal.

The Occupiers appealed.

Lynskey K.C. and *F. A. Sellers* for the appellants. The Divisional Court were wrong in holding that this hereditament was not a freight-transport hereditament within s. 5, sub-s. 1 (*c*), of the Rating and Valuation (Apportionment) Act, 1928. It is "a hereditament occupied and used wholly or partly for dock purposes": s. 5, sub-s. 1 (*c*); that is to say "all purposes connected with the shipping or unshipping at a dock of passengers and their luggage, or of carriages, parcels or merchandise": s. 5, sub-s. 2 (*c*). It is stated in para. 2 E of the special case that "no goods are received by the" appellants "into any of their warehouses unless they have been shipped to the port of Liverpool or are about to be shipped from that port." Next, the hereditament is occupied and used as part of a "dock undertaking": s. 5, sub-s. 1 (*c*); which means an undertaking carried on by a "dock authority." Para. 2 G of the special case states that the appellants are a dock authority carrying on a dock undertaking. It cannot be said that the hereditament is "primarily occupied and used for purposes ancillary to the general direction and management of a dock undertaking" within the proviso to s. 5, sub-s. 1 (*c*), so as to take it out of the principal enactment of that sub-section; because "dock undertaking," besides meaning "an undertaking carried on by a dock authority"—which the appellants have been found to be—includes "any other undertaking comprising as part thereof a dock": s. 5, sub-s. 3. This would include a warehouse undertaking comprising, as part thereof, a dock; which, being a dock undertaking, cannot be occupied and used for purposes merely ancillary to the direction and management of such an undertaking. It is true that the definition goes on to limit its scope and effect by the words "so far only as its business"—i.e., the business of the undertaking—"is carried on at or in connection with that dock," but it follows from paragraph 2 E of the special case that the whole business of the appellants is carried on in connection with their docks. It is not necessary for them to establish that the hereditament is occupied and used wholly for dock purposes; it is enough that it should be partly so used; but in fact, as stated in paragraph 2 C of the special case, the hereditament is occupied solely for the purpose of facilitating the passage of goods through the port and preventing congestion on the quays and delay to vessels using the port, and in connection with the shipping or unshipping of goods. The Addendum shows that the work of unshipping is not finished until after the cargo is deposited in the warehouse. It has then to be sorted according to bill of lading marks. This is done for the convenience of the shipowner as well as for that of the receivers of cargo. In some cases the cargo is stored in the shipowner's name and held to his order, and in any case it remains in the bonded warehouse until his lien for freight is discharged. Until the consignee produces a delivery order signed by the shipowner he cannot get delivery of his goods; the transit is not complete, the cargo is in course of transport, and the hereditament is being used for the unshipping of merchandise and therefore for dock purposes. But "dock purposes" within s. 5, sub-s. 1 (*c*), are not necessarily confined to such acts as fall to be performed by the shipowner. If the receiver desires to place his cargo in a warehouse, the use of the dock for landing the cargo and conveying it to the warehouse is a "dock purpose."

The hereditament is therefore a freight-transport hereditament and entitled to be derated as a whole, unless under s. 6 an apportionment is to be made in the net annual value on the ground that the hereditament is partly occupied and used for other than transport purposes. It is submitted that no such apportionment is to be made. By s. 6, sub-s. 3, it is enacted that, for the purpose of determining in what proportions a freight-transport hereditament is occupied and used for transport purposes and for other purposes, respectively, "the hereditament shall be deemed to be occupied and used for transport purposes," unless it is used as a dwelling-house, hotel, or place of public refreshment, none of which uses need be considered in this case. The hereditament is therefore to be deemed to be occupied and used for transport purposes, and therefore entitled to be derated as a whole, unless proviso (*b*) to sub-s. 3 excludes part of it from the benefit intended to be conferred on freight-transport hereditaments. By that proviso, in the case of a hereditament occupied and used for dock purposes as part of a dock undertaking, no part of the hereditament, being a building, yard, or other place "primarily occupied and used for warehousing merchandise not in the course of being transported," is to be deemed to be occupied and used for transport purposes. In paragraph 5 of the special case the Recorder has expressly found that no part of the hereditament is primarily occupied and used for warehousing merchandise not in the course of being transported. Proviso (*b*) therefore does not apply, and the whole hereditament is to be derated.

Sir William Jowitt A.-G., *Wilfrid Lewis* and *Colin H. Pearson* for the respondent. The Divisional Court rightly held that this hereditament was not and is not a freight-transport hereditament. It is not a hereditament occupied and used wholly or partly for dock purposes as part of a dock undertaking whereof a substantial proportion of the volume of business is concerned with the shipping or unshipping of merchandise. The hereditament is not itself a dock nor is it used as part of a dock. It is a warehouse. Warehouses and transport sheds on the River Mersey are the subject matter of different and dissimilar statutory provisions. Sect. 3 of the Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), defines "Docks" for the purposes of that Act as including both sheds and warehouses; but that does not mean that dock, warehouse, and shed are merely different names for the same thing. In fact they are three different things. By s. 165 the Dock Board have power to erect transit sheds. By s. 166 shipowners may cause their cargo, without making any entry thereof, but upon giving notice to the officers of Customs, to be landed in a transit shed; "and such cargo . . . . so landed and deposited in such transit shed . . . . shall be considered as still on board the vessel from whence the same shall have been landed." By s. 167 if any goods deposited in a transit shed are not duly entered with the Customs within forty-eight hours from the day when they were deposited, and duly weighed and measured, the Dock Board may cause them to be entered and, having obtained authority from the Customs Authorities, have them weighed and measured; and, when the goods have been passed by the landing waiter they shall cease to be considered as on board the vessel and are thenceforth at the risk, costs, and charges of the owner, subject to liens and charges attached on board the vessel. By s. 29 of the Mersey Docks and Harbour Board Act, 1920 (10 & 11 Geo. 5, c. lxxii.), if the owner does not remove them within the time specified, the Dock Board may remove them to some warehouse and detain them until the charges of removing and detaining them, and the amount of quay rent and penalties, and Customs dues and master porter's charges have been paid. If these charges and penalties have not been paid within ten days after removal, the goods may be sold. Warehouses are the subject of s. 172 and the following sections of the Act of 1858. First, by s. 3 "Warehouse Dock" means any wet dock or basin which may for the time being have a warehouse belonging to the Dock Board erected on the quays thereof. By s. 179 the Board may use as a bonded warehouse any of their warehouses or any part which is duly licensed to be used as such. By s. 183 no person except those appointed and employed by the Board may work within the walls of any Warehouse Dock in unshipping, landing, relanding, piling, housing, weighing, coopering, repairing, sampling, unpiling, unhousing, watching, shipping, loading, porterage and delivery of the cargo of any vessel using the dock, or any goods deposited or intended to be deposited within any warehouse erected on the quays of the dock, or in the performance of any other work in reference to the cargo. By s. 185 the Board may demand rents for goods warehoused, and may make charges for unshipping, landing, and other services mentioned in s. 183.

The answer to the questions, when the business of shipping or unshipping ends, and when the part played by the shipowner or the receiver respectively supervenes, must largely depend on the contract of affreightment and the custom of the particular port where the question arises: see, for example, *The Emilien Marie* (1) and *Dampskip Selskab*

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(1) (1875) 32 L. T. 435.

Svendborg v. *London Midland and Scottish Ry. Co.* (1) It seems clear from the above enactments that when the cargo has found its way from the ship into a warehouse on the Mersey, all further concern with the unshipping of it is over. Moreover the contract between shipper or receiver and shipowner is cogent to the same conclusion. Ninety per cent. of the tobacco landed at the Stanley Warehouses is shipped under bills of lading, which provide that the cargo is "to be delivered to King's warehouse," that is to "a place provided by the Crown or approved by the Commissioners for the deposit of goods for the security thereof and of the duties due thereon": see the Customs (Consolidation) Act, 1876 (39 & 40 Vict. c. 36), s. 284. The remaining 10 per cent. is conveyed to the warehouse in carts under the supervision of a Customs officer. As soon as the cargo has reached the warehouse, the business of unshipping is finished and the goods are no longer in the course of being transported: *Clyde Navigation Trustees* v. *Inland Revenue.* (2)

Lynskey K.C. in reply.

Solicitors for appellants: *Gregory, Rowcliffe & Co., for E. G. Finch, Liverpool.*

Solicitor for respondent: *The Treasury Solicitor.*

Cur. adv. vult.

BOTTOMLEY (REVENUE OFFICER FOR WEST DERBY ASSESSMENT AREA) *v.* WEST DERBY ASSESSMENT COMMITTEE AND MERSEY DOCKS AND HARBOUR BOARD (OCCUPIERS).

APPEAL by the Occupiers from the decision of a Divisional Court upon a case stated under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, by the Recorder of Liverpool at the instance of the Revenue Officer, who appealed against the decision of the Assessment Committee including in the special list for the Rating Area of the City of Liverpool the hereditament hereinafter mentioned, on the ground that it was a freight-transport hereditament.

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(1) [1930] 1 K. B. 83.

(2) 1930 S. C. 454.

1. The hereditament consisted of the Wapping warehouses and appurtenances, Wapping Dock, Liverpool.

2. The following facts were admitted or proved :—

A. Benjamin Green Bottomley is the Revenue Officer for the West Derby Assessment Area.

B. The hereditament consists of Dock warehouses situate on the East side of Wapping Dock, Liverpool. The building is of brick construction containing four floors above the quay floor. The quay floor has been inserted in the special list and is not part of the subject matter of the appeal to Quarter Sessions and is not assessed as part of the hereditament, but is included in the Occupiers' general assessment and is derated. The four upper floors are available and are used solely for the accommodation of goods passing through the port of Liverpool. During the year 1928 (which was the period taken for the purposes of this case) the four upper floors were used principally for the accommodation of tobacco and sugar. The hereditament is a bonded warehouse.

C. The hereditament together with the other warehouses of the Occupiers on the Dock Estate were acquired and are occupied and used by the Occupiers solely for the purposes of facilitating the passage of goods of all classes through the port, preventing congestion on the quays and delays to vessels using the port, and in connection with the shipping or unshipping of goods.

D. More than half of the goods warehoused on the hereditament consists of tobacco.

To this paragraph there was an

ADDENDUM.

D A. [This paragraph was, with the slight variations mentioned in the corresponding paragraph in the case relating to the Stanley Warehouses, in the same terms as that paragraph.]

D B. was as follows :—

Sugar.

(i.) There is no special form of bill of lading for the importation of sugar into the Liverpool Docks. During the year 1928 there were 3057 tons of sugar received into the Wapping Warehouses; of this amount 2863 tons were discharged ex ship on to the quay floor of the warehouses and 194 tons were brought to the warehouses by vehicle. The sugar was discharged by a master stevedore, whose charges were paid by the shipowner, the amount being a matter of arrangement between them and not known to the Occupiers. The master porter takes the bags out of the slings five bags at a time, and separates the bags to marks in order that they may be weighed to marks. The bags are trucked to a scale and are weighed and, while still on the scale, they are sampled by means of a trier which is thrust into the sack. After being weighed, those bags which are being delivered direct to the consignee are trucked from the scale and loaded on vehicles by the master porter. If however, as generally happens, the bags are being discharged more rapidly than can be coped with by the vehicles, the master porter deposits the bags on the quay until vehicles are available, and then the bags are delivered into the vehicles. The bags which are being taken into the warehouse are trucked by the master porter from the scale and, if they are going into vaults, they are tipped into one of the two chutes which lead from the quay to the vaults; if they are going to the first floor the bags are trucked to and placed in the cage hoist. There are no consolidated rates; all the master porter's charges are paid by the consignee.

(ii.) On receipt of the sugar at the foot of the chutes or on the upper floor the Occupiers' men count the number of bags and truck them to the piles where the bags are stowed to marks. For these operations the Occupiers are paid by the consignee.

(iii.) The 194 tons which came by vehicle were discharged from the ship by a master stevedore paid by the shipowner and were received on the quay by a master porter paid by the consignee, and were dealt with on the quay in the same manner as already described. The sugar came to the warehouses in vehicles paid for by the consignee. It was lifted off the vehicles by the Occupiers' servants by hydraulic crane. The carter would produce a master porter's counting-off note, and before the bags were removed from the cart they would be counted by the Occupiers' receiving foreman against the note. The bags come to warehouse separated to marks and are trucked from the doorway to the piles where they are stowed. The Occupiers are paid by the consignee 1*s.* 10*d.* per ton for receiving by land carriage.

Paragraphs E, F, G and H were in the same terms as those lettered E, F, G and H in the case of the Stanley Warehouses.

The graph D showed that in the Wapping Warehouses 59 per cent. of the mixed goods, tobacco and sugar, taken into the warehouses remain there more than three months. The plan of the hereditament in the schedule was marked E.[5]

3. The Revenue Officer contended :—

(*a*) That the hereditament was not a freight-transport hereditament within the meaning of s. 5 of the Rating and Valuation (Apportionment) Act, 1928.

(*b*) That it was not a freight-transport hereditament in that it was not occupied and used wholly or partly for dock purposes as part of a dock undertaking or for dock purposes within the meaning of the section.

(*c*) Alternatively :—

(i.) That the hereditament should not be deemed to be occupied and used for transport purposes by reason of the proviso (*b*) to s. 6, sub-s. 3, of the Act because of the fact that it is a building, yard, or other place primarily occupied and used for warehousing merchandise not in the course of being transported.

(ii.) That the merchandise taken to the hereditament has arrived at the destination to which it is consigned and that it is there warehoused for the consignees' convenience.

(iii.) That the hereditament is occupied and used not for transport purposes but as a warehouse, and that the Occupiers carry on there the business of wharfingers and warehousemen.

4. The Assessment Committee, besides repeating some of the contentions of the Occupiers set out in paragraph 3 hereof, submitted that, if the hereditament should be held to be a

freight-transport hereditament, no apportionment between occupation and user for transport purposes and occupation and user for other purposes should be shown in the valuation list.

5. The Occupiers contended :—

(*a*) That the hereditament was a freight-transport hereditament within the meaning of s. 5 of the Rating and Valuation (Apportionment) Act, 1928, by reason of the facts that they are a dock authority authorized to construct docks and are the owners of docks authorized by the provisions of the Mersey Docks and Harbour Acts, 1857 to 1928, and that the hereditament is occupied and used by them wholly or partly for those purposes and as part of their dock undertaking, being an undertaking whereof the whole or a substantial part of the whole of the business is concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of them, the Occupiers.

(*b*) That the hereditament is a freight-transport hereditament in that it is occupied and used wholly or partly for dock purposes as part of a dock undertaking and for dock purposes within the meaning of the said section.

(*c*) That the hereditament is not a building, yard, or other place primarily occupied or used for warehousing merchandise not in the course of being transported within the meaning of s. 6, sub-s. 3, proviso (*b*), of the Act, and is not primarily occupied and used for the purposes of the business of wharfingers or warehousemen, but on the contrary is primarily occupied and used by the Occupiers as a dock authority and for purposes connected with or incidental to the shipping and unshipping of goods at a dock and of warehousing goods in the course of being transported.

(*d*) That on the true construction of ss. 5 and 6 of the Act the hereditament, regard being had to the purpose of its use and occupation, is a freight-transport hereditament and is occupied and used for transport purposes.

(*e*) That upon the facts the hereditament is a freight-transport hereditament and is occupied and used for transport purposes.

(*f*) That merchandise taken to the hereditament has not arrived at its destination or at the destination to which it was consigned, nor is it there warehoused for the consignees' convenience.

6. In so far as it was a question of fact the Recorder found that the hereditament was primarily occupied and used for the purposes set out in paragraph 2 of this case, and that no part of the hereditament was primarily occupied and used for warehousing merchandise not in the course of being transported. In so far as it was a question of law or of mixed fact and law he was of opinion on the facts set out in paragraph 2 that the hereditament was occupied and used for purposes connected with the shipping and unshipping of merchandise at a dock and for warehousing merchandise in course of being transported, and was not primarily occupied and used for warehousing merchandise not in the course of being transported. He was also of opinion that the occupation and user of the hereditament was ancillary to the purpose of the shipping or unshipping of goods at a dock. He therefore decided in favour of the contentions of the Assessment Committee and the Occupiers, and gave judgment in their favour and ordered the hereditament to remain in the special list.

7. The question for the opinion of the Court was whether the Recorder came to a correct determination and decision in point of law.

The Divisional Court (Lord Hewart C.J. and Avory and MacKinnon JJ.) reversed the decision of the Recorder and allowed the appeal, and ordered that all reference to the hereditament should be deleted from the special list.

The Occupiers appealed.

Lynskey K.C. and *F. A. Sellers* for the appellants. This hereditament consists of the upper floors, four in number, of a building, the ground floor of which is already derated. The merchandise dealt with consists of tobacco and sugar. So far as tobacco is concerned, which is more than half of the produce handled, the facts and arguments relating to the Stanley Warehouses apply to this case.

With regard to the sugar, no special form of bill of lading is used; the bulk of the sugar is discharged ex ship on the quay in bags by a master stevedore paid by the shipowner. The master porter sorts the bags to marks, weighs them and samples the contents, and loads some on the consignees' vehicles. For these services the master porter is paid by the consignees. But in all those cases where the goods are by the bills of lading deliverable to the consignee it is clear that the master porter is taking part in the unshipping of the cargo. Some portion of the bulk goes into the warehouse, in which case the master porter trucks the bags from the scales, some into chutes and some into cage hoists, and is in either case paid by the consignee. When these goods have reached the warehouse they are sorted to marks by the appellants' servants, and for this work the appellants are paid by the consignees. In this case also part of the unshipping of the merchandise is done by the appellants, and the hereditament is occupied and used partly for dock purposes as part of a dock undertaking within s. 5, sub-s. 1 (*c*), and sub-s. 2 (*c*). The appellants are therefore entitled to have it entered in the special list as a freight-transport hereditament.

Wilfrid Lewis (*Sir William Jowitt A.-G.* and *Colin H. Pearson* with him) for the respondent. This case is less favourable to the appellants than the preceding one, because all that is done on the quay floor of this building must be excluded from consideration as having already gone to establish the docks themselves as a freight-transport hereditament. The four upper floors, which constitute the hereditament in question, are a bonded warehouse. The unshipping of the tobacco and sugar is over when the goods are in the warehouse.

Lynskey K.C. in reply.

Solicitors for appellants: *Gregory, Rowcliffe & Co., for E. G. Finch, Liverpool.*

Solicitor for respondent: *The Treasury Solicitor.*

Cur. adv. vult.

C. A.
1931

MERSEY DOCKS AND HARBOUR BOARD v. WEST DERBY ASSESSMENT COMMITTEE AND BOTTOMLEY (No. 2).

MERSEY DOCKS AND HARBOUR BOARD (OCCUPIERS) v. ASSESSMENT COMMITTEE FOR WEST DERBY ASSESSMENT AREA AND BOTTOMLEY (REVENUE OFFICER) (No. 2).

APPEAL by the Occupiers from the decision of a Divisional Court upon a case stated under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, by the Recorder of Liverpool at the instance of the Mersey Docks and Harbour Board, hereinafter called "the Occupiers," who appealed from the decision of the West Derby Assessment Committee excluding from the special list for the Rating Area of the City of Liverpool the hereditament hereinafter mentioned on the ground that it was not a freight-transport hereditament.

The hereditament consisted of the Albert Warehouses and appurtenances, Albert Dock, Liverpool.

2. The following facts were admitted or proved :—

(A) Benjamin Green Bottomley is the Revenue Officer for West Derby Assessment Area.

(B) The hereditament consists of three blocks of warehouses situate on the East, South, and West of the Albert Dock, Liverpool. Each block contains vaults, quay, and four upper floors. The warehouses, which are bonded warehouses, have a floor area of 96,278 square yards. The hereditament is available and is used solely for the accommodation of goods passing through the port of Liverpool. During the year 1928 (which was the period taken for the purposes of this case) the hereditament was used for the accommodation of wines, spirits, etc., in the vaults, and of sugar and tobacco on the upper floors. In so far as the wine is concerned a certain amount of vatting and barrelling takes place on the hereditament.

(C) [This paragraph was in the same terms as the corresponding paragraph (C) in the case of the Stanley Warehouses.]

(D) Instead of paragraph D as originally drafted an Addendum D A was by agreement substituted. Paragraphs i., ii., iii. and iv. of this Addendum were in the same terms as the Addendum D A (*a*) and (*b*) in the case of the Stanley Warehouses. In the present case the Addendum continued as follows :—

D B. *Sugar.*—There is no special form of bill of lading for the importation of sugar into the Liverpool Docks. During the year 1928 there were 3369 tons of sugar received into the Albert Dock Warehouses, all of which were brought to the warehouses by road vehicles. The sugar had been discharged from the ships by master stevedores paid by the shipowners and received on the quay by master porters paid by the consignees. The master porter had selected to marks on the quay and had weighed. The sugar came to the warehouses in vehicles paid for by the consignees. It was lifted off the vehicles by servants of the Occupiers by means of an hydraulic hoist. The carter produced a master porter's counting-off note, and before the bags were removed from the cart they were counted by the Occupiers' receiving foreman against the note. The bags come to these warehouses separated to marks, and are trucked from the doorway to the piles where they are stowed. The Occupiers are paid by the consignee 22*d.* per ton for receiving by land carriage.

D C. *Wine.*—There is no special form of bill of lading for the importation of wine into the Liverpool Docks. During the year 1928 there were 1058 tons of wines and spirits received into the Albert Dock Warehouses. The wine is discharged by a master stevedore whose charges are paid by the shipowner ; the amount is a matter of arrangement between them and is not known to the Occupiers.

The master stevedore discharges the wine on the quay into the custody of a master porter paid by the consignee. The master porter receives the cask as it is landed, separates it to marks, and sets it up on the quay ; and the Customs officers gauge it and sample it there. All the wine which comes to these warehouses is carted from a dock by the consignees, being delivered on to the vehicle by a master porter, and is received by the Occupiers on a receiving order given by the consignee. On arriving at the warehouses the vehicles are unloaded on the gauging floor by hydraulic hoists by the

Occupiers' men; the carter produces a master porter's counting-off note, and the casks are counted by the Occupiers' receiving foreman against the note. The casks are separated on the gauging floor into the different consignments.

The rest of the special case, from paragraph E to the end, was in the same terms as that relating to the Stanley Warehouses.

The graph D showed that of the goods, tobacco, sugar, and wine, taken into the warehouses 65 per cent. remain there for more than three months.

The Recorder decided in favour of the Occupiers and allowed the appeal.

The Divisional Court (Lord Hewart C.J. and Avory and MacKinnon JJ.) reversed the decision of the Recorder and ordered that judgment should be entered for the Revenue Officer.

The Occupiers appealed.

Lynskey K.C. and *F. A. Sellers* for the appellants.

Sir William Jowitt A.-G., *Wilfrid Lewis* and *Colin H. Pearson* for the respondent.

The arguments of counsel were to the same effect as urged in the preceding cases.

Solicitors for appellants: *Gregory, Rowcliffe & Co., for E. G. Finch, Liverpool.*

Solicitor for respondent: *The Treasury Solicitor.*

Cur. adv. vult.

BOTTOMLEY (REVENUE OFFICER FOR WEST DERBY ASSESSMENT AREA) v. WEST DERBY ASSESSMENT COMMITTEE AND THE MERSEY DOCKS AND HARBOUR BOARD (OCCUPIERS) (No. 2).

APPEAL by the Occupiers from the decision of a Divisional Court upon a case stated under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, by the Recorder of Liverpool at the instance of the Revenue Officer for the West Derby Assessment Area, who appealed against the decision of the Assessment Committee including the hereditament hereafter mentioned in the special list for the Rating Area of the City of Liverpool as a freight-transport hereditament. The hereditament was described as a wool warehouse and appurtenances situate in Great Howard Street, Liverpool.

2. The following facts were admitted or proved :—

A. Benjamin Green Bottomley is the Revenue Officer for the West Derby Assessment Area.

B. The hereditament consists of a warehouse situate in Great Howard Street, Liverpool, bounded on the North by the tow path of the Leeds and Liverpool Canal, on the East by the London Midland and Scottish Railway, on the South by buildings fronting Sherwood Street, and on the West by Great Howard Street. There is no communication between the railway and the warehouse, the railway level being above the roof of the warehouse. There is a goods entrance to the warehouse on the North and South sides. The North and South approaches are at right angles to Great Howard Street. On the North side there is a sliding door giving access from the building across the tow path to the Leeds and Liverpool Canal. The hereditament is available and is used solely for the accommodation of goods passing through the port of Liverpool. During the year 1928 (which was the period taken for the purposes of this case) the hereditament was used for the accommodation of wool.

C. The hereditament together with the other warehouses of the Occupiers on the Dock estate were acquired and are occupied and used solely for the purposes of facilitating the passage of goods of all classes through the port and of preventing congestion on the quays and delay to vessels using the port, and in connection with the shipping or unshipping of goods.

D. No goods are received by the Occupiers into any of their warehouses unless they have been shipped to the port of Liverpool or are about to be shipped from that port.

E. The Occupiers are a statutory undertaking established by the Mersey Docks and Harbour Board Act, 1857. The members of the Dock Board serve without remuneration. Their duties are to manage the port and (except in special cases which have no bearing on this case) to apply the revenue solely to purposes which conduce to the safety or convenience of ships frequenting the port of Liverpool or facilitate the shipping or unshipping of goods and to the discharge of a debt contracted for the above purposes. The total value of goods passing through the port of Liverpool in 1928 was 485,386,000*l.*, of which 12,207,000*l.* or 2½ per cent. passed through the Occupiers' warehouses.

F. The Occupiers are a dock authority carrying on a dock undertaking within the meaning of s. 5 of the Rating and Valuation (Apportionment) Act, 1928.

G. The whole of the wool received at the said hereditament is delivered direct from the importing vessels into the steam waggons of the Occupiers, whence it is deposited in the hereditament. The hereditament is capable of storing 160,000 bales, but only 75,000 bales or thereabouts are actually stored therein owing to the remaining space being required for the operations hereinafter appearing.

H. The hereditament was originally acquired by the Occupiers for the primary purpose of facilitating the handling of wool through the port of Liverpool. All wool imported having been taken direct from the ships to the hereditament by steam waggons of the Occupiers as aforesaid, the normal quay operations of separating the bales and allocating them to their bills of lading marks (in this trade a very detailed task) are carried on upon the hereditament. The bales of wool are opened for sampling. The samples taken are then graded by the brokers, and the corresponding bales are weighed and numbered according to their grade and are open to inspection. The wool is sold by auction in Liverpool from the samples or after inspection, and is practically all removed immediately after the sale. Sales take place eight times a year at intervals of about six weeks.

ADDENDUM.

H A. (i.) East India wool is imported into Liverpool Docks on bills of lading which vary in form. There is no special bill of lading for the wool trade. The wool is discharged by a master stevedore, who is paid by the shipowner, and is landed on the quays into the custody of the master porter, who may be the same person as the master stevedore. The charge made to the shipowner by the master stevedore is a matter of arrangement between them and is not known to the Occupiers. Each bale of wool is marked with what are known in the trade as " brands " and " leading marks." The bales are stowed indiscriminately in the holds of the ship and are landed in the same way on a quay, usually about four bales at one time. The master porter takes the bales out of the sling on to hand trucks, dealing with one bale at a time, and, whenever possible, trucks them across the quay and delivers them directly into the Occupiers' vehicles. If, however, as generally happens, the bales are being discharged more rapidly than can be coped with by the vehicles, the master porter deposits the bales on the quay until vehicles are available, and then the bales are delivered into the vehicles. The master porter's counter-off counts and enters into his counting-off book the number of bales delivered to each vehicle and obtains a receipt from the carter and hands him a counterfoil of the receipt. Upon arrival at the warehouse the carter hands the counterfoil receipt to the receiving foreman who again counts the bales. The bales are not selected to bill of lading marks, weighed, or examined for damage on the quay. For the actual operations performed by the master porter above described he is paid by the consignee 3.75*d.* per bale.

(ii.) The charge for cartage from the landing quay to the warehouse is included in the consolidated rate which is paid by the consignee. Bales of wool are unloaded by hand on the ground floor, the area of which is 15,800 square yards. The whole of this area is available for receiving. The receiving ground for the wool out of each ship is prepared by chalking out on the floor a space for each brand as shown in the ship's manifest which is furnished to the Occupiers by the shipowner before the arrival of the ship. When taken from the vehicles the bales as far as practicable are sorted to brand marks and trucked to and deposited on the ground set aside for the brand shown on the bale. In times of pressure or when the wool is received just before closing time at the warehouse, which is 5 o'clock P.M., the bales are trucked to a temporary stowage on the ground floor of the warehouse and the operation of sorting them to brand and distributing them in their appropriate receiving ground is proceeded with as soon as possible. The selecting to marks is in fact included in the consolidated rate though it is not set out on p. 71 of the rate book as one of the operations so included. The Housing per Land Carriage rate also, referred to in clause 8 on p. 15, does not include selecting to marks. The selecting to marks being an operation included in the consolidated rate is paid for by the consignee, and the shipowner does not pay either to the Occupiers or to the consignee anything in respect of it. The scales are on the ground floor, and in the vicinity of the scales the floor is divided out in chalk into separate areas identified with the different leading marks. The bale is then weighed and sampled and trucked away to the area bearing its leading mark. The weight of the bale is recorded in the Receiving Book. The placing of the bale after weighing into its proper area is the housing referred to on p. 71. Any bales which are to be tared or mended are then dealt with. The warehouse consists of a basement, ground floor and upper floor.

(iii.) The samples are forwarded to the brokers, who then send down lotting sheets—i.e., instructions as to how the bales are to be lotted and placed on show. After the completion of the weighing and after all the brand marks and under marks have been checked, a return is compiled by the warehouse keeper giving the name of the merchant or broker, the number of bales per ship's delivery orders, the number of bales received and taken to account per ship's delivery orders, bales short per ship's delivery orders, bales per master porter's counting-off notes, and bales on ship's account. The last item of information, bales on ship's account, gives the number of bales upon which the brand mark does not agree with the brand mark on the ship's manifest. The bales entered in this column are entered on a statement of "Particulars of wool placed to ship's account," and the brand marked on the bales or bale is given together with the warehouse number. A further return is prepared giving particulars of the wool short received per ship's delivery orders, the name of the merchant or broker, brand, number of bales, and identifying the delivery order relating thereto. Copies of these three statements are sent to the shipowner and merchants or brokers concerned, and accompanying the return to the shipowner is sent the original ship's delivery order. It is left to the shipowner and the merchant or broker to settle between themselves with respect to the discrepancies shown by the statements. The bales are next taken from the ground floor to the upper floor and are placed in show piles in the order of the lotting numbers supplied by the brokers. The tallies showing the lot numbers and the number of bales in the lot are affixed to each bale. The bales are then included by the consignee or brokers in the next series of wool sales, and when they are sold delivery orders are given by the consignee or broker concerned to the purchaser. The purchaser is allowed by the seller fourteen days from the date of sale during which to remove the wool he has purchased. The delivery rate is paid by the buyer. The rates other than the consolidated rate set out on p. 71, and the rates on pp. 70, 72, and 73 are for the most part in respect of wools other than East India wool. These other wools only form about 12 per cent. of the total wool dealt with in the warehouse, and in these cases the consignee pays the quay delivery rate, column 1, to the master porter for receiving from the ship and handling on and delivery from the quay. The most important of the wools mentioned coming to the wool warehouse are the River Plate, South

American, and other descriptions, and the rates paid by the consignees to the Occupiers are those shown in column 4 on p. 70, for receiving from the consignee's vehicles and housing. The delivery rates in column 5 are paid by the buyer. The consolidated rate does not include any rent which is paid by the consignee on the whole consignment from the first day upon which any part of the consignment is received into warehouse and which continues against him up to the sale prompt date, which date is fourteen days after the sale.

J. There are annexed hereto forming part of this case: (i.) A schedule marked A showing the tonnage warehoused in the hereditament and the length of time the tonnage remains therein; (ii.) a plan marked B showing the estate of the Occupiers and the situation of the hereditament; (iii.) a hand book marked C showing the Liverpool warehouse rates and charges which are applicable to the tonnage in the hereditament; (iv.) a graph marked D showing in terms of percentage the rates of disposal of goods stored in the hereditament during the year 1928. Graph D showed that of the wool brought into the warehouse two-thirds went out in a month, and 85 per cent. by the end of two months. Four per cent. remained at the end of a year. There was a plan of the hereditament marked E^2.

3. The appellant contended:—

(*a*) That the hereditament is not a freight-transport hereditament within the meaning of s. 5 of the Rating and Valuation (Apportionment) Act, 1928.

(*b*) That the hereditament is not a freight-transport hereditament in that it is not occupied and used wholly or partly for dock purposes as part of a dock undertaking or for dock purposes within the meaning of the section.

(*c*) Alternatively:—

(i.) That the hereditament should not be deemed to be occupied and used for transport purposes by reason of the proviso to s. 6, sub-s. 3 (*b*), of the Act because of the fact that it is a building, yard, or other place primarily occupied and used for warehousing merchandise not in the course of being transported.

(ii.) That the merchandise taken to the hereditament has arrived at the destination to which it was consigned, and that it is there warehoused for the consignees' convenience.

(iii.) That the hereditament is occupied and used not for transport purposes but as a warehouse, and that the Occupiers carry on there the business of wharfingers and warehousemen.

4. The Assessment Committee contended :—

(*a*) That the hereditament is a freight-transport hereditament within the meaning of s. 5 of the Rating and Valuation (Apportionment) Act, 1928.

(*b*) That the hereditament is occupied and used by the Occupiers wholly or partly for dock purposes as part of their dock undertaking within the meaning of s. 5 of the Act.

(*c*) That the hereditament is primarily occupied and used by the Occupiers for warehousing merchandise in the course of being transported, and as such is part of the dock undertaking of the respondents and wholly or partly occupied and used for the dock purposes as part of the dock undertaking within the meaning of s. 5 of the Act.

(*d*) That if the hereditament is a freight-transport hereditament no apportionment between occupation and user for transport purposes and occupation and user for other purposes should be shown in the valuation list.

5. The Occupiers contended :—

(*a*) That the hereditament is a freight-transport hereditament within the meaning of s. 5 of the Rating and Valuation (Apportionment) Act, 1928, by reason of the facts that they the Occupiers are a dock authority authorized to construct docks and are the owners of docks authorized by the provisions of the Mersey Docks and Harbour Acts, 1857 to 1928, and that the hereditament is occupied and used by them wholly or partly for the purposes and as part of their dock undertaking being an undertaking whereof the whole or a substantial portion of the whole of the business is concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the Occupiers.

(*b*) That the hereditament is a freight-transport hereditament in that it is occupied and used wholly or partly for dock purposes as part of a dock undertaking and for dock purposes within the meaning of s. 5 of the Act.

(*c*) That the hereditament is not a building, yard, or other place primarily occupied or used for warehousing merchandise not in the course of being transported within the meaning of s. 6, sub-s. 3, proviso (*b*), of the Act, and is not primarily occupied and used for the purposes of the business of wharfingers or warehousemen, but on the contrary is primarily occupied and used by the Occupiers as a dock authority and for purposes connected with or incidental to the shipping and unshipping of goods at a dock and of warehousing goods in the course of being transported.

(*d*) That on the true construction of ss. 5 and 6 of the Act the hereditament, regard being had to the purpose of its use and occupation, is a freight-transport hereditament and is occupied and used for transport purposes.

(*e*) That upon the facts the hereditament is a freight-transport hereditament and is occupied and used for transport purposes.

(*f*) That merchandise taken to the hereditament has not arrived at its destination or at the destination to which it was consigned, nor is it there warehoused for the consignees' convenience.

6. In so far as it was a question of fact the Recorder found as a fact that the hereditament was primarily occupied and used for the purposes set out in paragraph 2 above, and that no part of it was primarily occupied and used for warehousing merchandise not in the course of being transported. In so far as it was a question of mixed fact and law he was of opinion on the facts set out in paragraph 2 that the hereditament was occupied and used for purposes connected with the shipping or unshipping of merchandise at a dock and for warehousing merchandise in the course of being transported, and was not primarily occupied and used for

warehousing merchandise not in the course of being transported. He was also of opinion that the occupation and user of the hereditament was ancillary to the purpose of the shipping or unshipping of goods at a dock. He therefore decided in favour of the Assessment Committee and the Occupiers and ordered the hereditament to remain in the special list.

7. The question for the Court was whether upon the above facts the Recorder came to a correct determination and decision in point of law.

The Divisional Court (Lord Hewart C.J. and Avory and MacKinnon JJ.) held that the case came within proviso (*b*) to s. 6, sub-s. 3, and allowed the appeal and ordered that all reference to the hereditament should be deleted from the special list.

The Occupiers appealed.

Lynskey K.C. and *F. A. Sellers* for the appellants. For reasons similar to those already urged in the cases of the three bonded warehouses, this wool warehouse is a freight-transport hereditament. But there is the additional reason in this case, that, as stated in paragraph 2 G of the special case, the appellants take delivery of all the wool from the ship into their steam waggons. The Addendum H A (i.) to this case states that the master porter, who is paid by the consignee, takes the bales out of the sling and trucks them across the quay and delivers them into the waggons of the appellants, who therefore take an important part in the unshipping of the cargo. Their warehouse is occupied and used in connection with the unshipping. Moreover the sorting of the bales to their bill of lading marks takes place in the warehouse.

Sir William Jowitt A.-G., *Wilfrid Lewis* and *Colin H. Pearson* for the respondent. As soon as the wool is received into the appellants' waggons the work of unshipping is accomplished. The wool is warehoused and remains in the warehouse until it is sold. By s. 3 of the Act storage purposes are excluded from industrial purposes, so that stores may be excluded from the special list; it would be strange if they could find a way into that list through s. 5 as freight-transport hereditaments.

Lynskey K.C. in reply.

Solicitors for appellants: *Gregory, Rowcliffe & Co., for E. G. Finch, Liverpool.*

Solicitor for respondent: *The Treasury Solicitor.*

Cur. adv. vult.

BOTTOMLEY (REVENUE OFFICER FOR WEST DERBY ASSESSMENT AREA) *v.* WEST DERBY ASSESSMENT COMMITTEE AND MERSEY DOCKS AND HARBOUR BOARD (OCCUPIERS) (No. 3).

APPEAL from the decision of a Divisional Court upon a case stated under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, by the Recorder of Liverpool at the instance of the Revenue Officer for the West Derby Assessment Area, who appealed against the decision of the West Derby Assessment Committee including in the special list for the Rating Area of the City of Liverpool as a freight-transport hereditament certain warehouses described as Warehouse, Sections G, H, J, K, L, M, and N, East Waterloo Dock, Liverpool, occupied by the Mersey Docks and Harbour Board.

The following facts were admitted or proved:—

A. Benjamin Green Bottomley is the Revenue Officer for the West Derby Assessment Area.

B. The hereditament consists of warehouses situate on the North and West sides of East Waterloo Dock, Liverpool, and known as sections G, H, J, K, L, M, and N. The building contains a quay floor and five upper floors, all of which are available and used solely for the accommodation of goods passing through the port of Liverpool. During the year 1928 (which was the period taken for the purposes of this case) the said floors were used for the accommodation of grain.

C. The hereditament together with the other warehouses of the Occupiers on the Dock Estate were acquired and are occupied and used by the Occupiers solely for the purpose of facilitating the passage of goods of all classes through the port and preventing congestion on the quays and delay to vessels using the port, and in connection with the shipping or unshipping of goods.

D. No goods are received by the Occupiers into any of their warehouses unless they have been shipped into the port of Liverpool or are about to be shipped from the port.

E. The Occupiers are a statutory undertaking established by the Mersey Docks and Harbour Act, 1857. The members of the Dock Board serve without remuneration, and their duties are to manage the port and (except in special cases which have no bearing on this case) to apply the revenue solely to purposes which conduce to the safety or convenience of ships frequenting the port of Liverpool or facilitate the shipping or unshipping of goods and to the discharge of a debt contracted for the above purposes. The total value of goods passing through the port of Liverpool in 1928 was 485,386,000*l.*, of which 12,207,000*l.* or 2·5 per cent. passed through the Occupiers' warehouses.

F. The Occupiers are a dock authority carrying on a dock undertaking within the meaning of s. 5 of the Rating and Valuation (Apportionment) Act, 1928.

G. The hereditament is situate on the dock side and is equipped with elevating machinery. Most of the grain is received in bulk through the elevators for shipping or unshipping grain in bulk into or from the vessels or lighters which come alongside. Vessels carrying cargoes up to 1000 tons can enter the dock at any tide. Larger vessels can enter on the higher tides up to a vessel carrying 4000 to 5000 tons on the spring tides, but a large amount of grain is brought and taken away by lighter.

H. There are annexed to and form part of this case (i.) a schedule marked A showing the tonnage warehoused in the hereditament and the length of time that tonnage remains in the hereditament, (ii.) a plan marked B showing the estate of the Occupiers and the situation of the hereditament, (iii.) a handbook of the Liverpool warehouse rates and charges marked C, which rates and charges are applicable to the tonnage in the hereditament. [One rate allowed warehouse space for three days, a second and higher rate allowed accommodation for six days, and there was a third, which was a weekly rate. There was also annexed to the Case (iv.) a graph marked D, showing in terms of percentage the rate of disposal of goods stored in the warehouse during the year 1928, from which it appeared that of the grain brought into the hereditament 65 per cent. went out by the end of a month and 85 per cent. by the end of two months. There was a plan of the hereditament, marked E^3.]

3. The Revenue Officer contended :—

(*a*) That the hereditament is not a freight-transport hereditament within the meaning of s. 5 of the Rating and Valuation (Apportionment) Act, 1928.

(*b*) That it is not occupied and used wholly or partly for dock purposes as part of a dock undertaking or otherwise within the meaning of that section.

(*c*) Alternatively :—

(i.) That the hereditament should not be deemed to be occupied and used for transport purposes by reason of the proviso to s. 6, sub-s. 3, of the Act because of the fact that it is a building, yard, or other place primarily occupied and used for warehousing merchandise not in the course of being transported.

(ii.) That the merchandise taken to the hereditament has arrived at the destination to which it was consigned and that it is there warehoused for the consignees' convenience.

(iii.) That the hereditament is occupied and used not for transport purposes but as a warehouse, and that the Occupiers carry on there the business of wharfingers and warehousemen.

4. The Assessment Committee contended :—

(*a*) That the hereditament is a freight-transport hereditament within the meaning of s. 5 of the Rating and Valuation (Apportionment) Act, 1928.

(*b*) That it is occupied and used by the Occupiers wholly or partly for dock purposes as part of their dock undertaking within the meaning of s. 5.

(*c*) That it is primarily occupied and used by the Occupiers for warehousing merchandise in the course of being transported and as such is part of their dock undertaking and wholly or partly occupied for the dock purposes as part of the dock undertaking within the meaning of s. 5.

(*d*) That if the hereditament is a freight-transport hereditament, no apportionment between occupation and user for transport purposes and occupation and user for other purposes should be shown in the valuation list.

5. The Occupiers contended :—

(*a*) That the hereditament is a freight-transport hereditament within the meaning of s. 5 of the Rating and Valuation (Apportionment) Act, 1928, by reason of the fact that they are a dock authority authorized to construct docks and the owners of docks authorized by the provisions of the Mersey Docks and Harbour Board Acts, 1857 to 1928, and that the hereditament is occupied and used by them wholly or partly for such purposes as part of their dock undertaking being an undertaking whereof the whole or a substantial proportion of the volume of the business is concerned with the shipping and unshipping of merchandise not belonging to them or intended for their use.

(*b*) That the hereditament is a freight-transport hereditament in that it is occupied and used wholly or partly for dock purposes as part of a dock undertaking and for dock purposes within the meaning of the said section.

(*c*) That the hereditament is not a building, yard, or other place primarily occupied or used for warehousing merchandise not in the course of being transported within the meaning of s. 6, sub-s. 3, proviso (*b*), of the said Act, and is not primarily occupied and used for the purposes of the business of wharfingers or warehousemen but on the contrary is primarily occupied and used by the Occupiers as a dock authority and for purposes connected with and incidental to the shipping and unshipping of goods at a dock and warehousing goods in the course of being transported.

(*d*) That on the true construction of ss. 5 and 6 of the Act the hereditament having regard to the purpose of its use and occupation is a freight-transport hereditament and is occupied and used for transport purposes.

(*e*) That upon the facts the hereditament is a freight-transport hereditament and is occupied and used for transport purposes.

(*f*) That merchandise taken to the hereditament has not arrived at its destination or at the destination to which it has been consigned nor is it there warehoused for the consignees' convenience.

6. In so far as it was a question of fact the Recorder found that the hereditament was primarily occupied and used for the purposes set out in paragraph 2 above and that no part of the hereditament was primarily occupied and used for warehousing merchandise not in the course of being transported. In so far as it was a question of law or of mixed fact and law he was of opinion on the facts set out in paragraph 2 that the hereditament was occupied and used for purposes connected with the shipping or unshipping of merchandise at a dock and for warehousing merchandise in the course of being transported and was not primarily occupied and used for warehousing merchandise not in the course of being transported. He was also of opinion that the occupation and user of the hereditament was ancillary to the purpose of shipping or unshipping of goods at a dock. He therefore decided in favour of the Assessment Committee and the Occupiers and ordered the hereditament to remain in the special list.

7. The question for the opinion of the Court was whether upon the facts the Recorder came to a correct determination and decision in point of law.

8. If the Court should answer the question in the affirmative the order was to stand; if not, the Court was requested to make such order as it should think fit.

The Divisional Court (Lord Hewart C.J. and Avory and MacKinnon JJ.) affirmed the decision of the Recorder and dismissed the appeal of the Revenue Officer.

The Revenue Officer appealed.

In this case the judgment of the Divisional Court was given and entered in the Crown Office on January 23, 1931; it was drawn up and sealed on January 26; on March 5 notice of appeal to the Court of Appeal was entered.

Lynskey K.C. and *F. A. Sellers* for the respondents. There is a preliminary objection to the hearing of this appeal on the ground that the notice of appeal was not given in time.

By Order LVIII., r. 15, of the Rules of the Supreme Court: "Subject and without prejudice to the powers of the Court of Appeal under Order LXIV., r. 7, no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall be brought after the expiration of fourteen days, and no other appeal shall be brought after the expiration of six weeks, unless the Court or a Judge, at the time of making the order or at any subsequent time or the Court of Appeal shall enlarge the time. The said respective periods shall be calculated, in the case of an appeal from an order in chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases, from the time at which the judgment or order is signed, entered, or otherwise perfected" . . . . The hearing of the special case was not the hearing of an action, and therefore the appeal from the decision ought to have been brought within fourteen days from the time when the judgment was signed, entered or otherwise perfected. The judgment was signed, entered or otherwise perfected on January 23: *Higher Bebington Local Board* v. *Lightbound.* (1) It is otherwise of a judgment in an action, which is not perfected until it is sealed: *River Thames Conservators* v. *Kent.* (2) The time for appealing expired on February 6, fourteen days after January 23.

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(1) (1885) 29 Sol. J. 500.

(2) (1915) 59 Sol. J. 612.

C. A.
1931

BOTTOMLEY v. WEST DERBY ASSESSMENT COMMITTEE AND MERSEY DOCKS AND HARBOUR BOARD (No. 3).

Wilfrid Lewis (*Sir William Jowitt A.-G.* and *Colin H. Pearson* with him) for the appellant. By s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925: "'Action' means a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court" . . . . The expression "rules of court" is not confined to the Rules of the Supreme Court: *Johnson* v. *Refuge Assurance Co.* (1), per Buckley L.J. The Court of Quarter Sessions has Rules of Court, and that was the Court in which the present proceedings commenced. In *Cox* v. *Hoare* (2) it was held by Bray J. that an arbitration was a civil proceeding commenced as prescribed by Rules of Court within the meaning of the Judicature Act, 1873, s. 100, which is in the same words as s. 225 of the Act of 1925. In *Rex* v. *Westminster Assessment Committee* (3) an application for a writ of mandamus was held by the Court of Appeal to fall within the same class of proceedings. The same reasoning applies to the special case stated by the Quarter Sessions. The time for appealing is therefore not fourteen days, but six weeks, and the notice of appeal was in time.

Lynskey K.C. in reply. This proceeding commenced before the Assessment Committee. It was commenced neither by writ nor in any manner prescribed by Rules of Court. It is therefore not an "action" within s. 225 of the Act of 1925, and therefore the time for appealing is not six weeks.

SCRUTTON L.J. The Court will take time to consider whether the preliminary objection is good or not. But we are clearly of opinion that, if it is good, we ought to extend the time for appealing and hear the appeal on its merits. The obscurity of the rules relating to appeals is deplorable.

Upon the main point:—

Sir William Jowitt A.-G., *Wilfrid Lewis* and *Colin H. Pearson* for the appellant. This hereditament is not a freight-transport hereditament, because it is not occupied or used wholly or partly for "dock purposes." "Dock

(1) [1913] 1 K. B. 259, 263.
(2) (1906) 95 L. T. 121.
(3) [1917] 2 K. B. 215.

purposes " are defined purposes " connected with " shipping or unshipping. The words " connected with " import a closer relation than the words " concerned with." The purposes of the hereditament must be " connected with " shipping or unshipping " at a dock." A transit shed for goods merely in the course of transport from the ship to a railway, for example, on their way to an inland destination, would be occupied and used for purposes " connected with " the unshipping. The goods would resemble a passenger in a waiting room, having changed from one railway system to another in the course of his journey. But generally, when the goods have reached a warehouse the unshipping is over, and the purposes of the warehouse are not connected with it.

[SCRUTTON L.J. The cases on stoppage in transitu may offer an analogy : *Dixon* v. *Baldwen* (1) for example.]

As long as the consignor can still give instructions as to the transit, the dock or wharf, or even the warehouse where the goods may be temporarily deposited, may be merely a stage in their transport, and the purposes of such a depot may be connected with their transport; but there is nothing to suggest that this hereditament is of that transmissive character. It follows that the hereditament is not a freight-transport hereditament within s. 5.

But if it should be held to come within s. 5, it is excluded from that section by proviso (*b*) to s. 6, sub-s. 3, being a yard or other place primarily occupied and used for warehousing merchandise not in the course of being transported.

Lynskey K.C. and *F. A. Sellers* for the respondents. The argument for the appellant owes much of its force to the omission of the words " as part of a dock undertaking." By s. 5, sub-s. 1, " The expression ' Freight-transport hereditament ' means . . . . a hereditament occupied and used wholly or partly for dock purposes as part of a dock undertaking . . . . whereof a substantial proportion of the volume of business is concerned with the shipping and unshipping of merchandise." . . . . A dock undertaking means "an undertaking carried on by a dock authority," and includes other undertakings comprising a dock as part thereof. That an undertaking carried on by a dock authority may comprise a warehouse in which the merchandise may be deposited seems clear from the definition of "dock" as including "any harbour, wharf, pier, jetty, or other works in or at which vessels can . . . . unship merchandise." . . . . Being a freight transport hereditament within s. 5 the hereditament is not excluded by proviso (*b*) to s. 6, sub-s. 3, because the purposes for which it is occupied and used are not an end in themselves but are directly connected with the main purposes of a dock and are part of a dock undertaking.

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(1) (1804) 5 East, 175.

Wilfrid Lewis in reply.

Solicitor for the appellant: *The Treasury Solicitor.*

Solicitors for the respondents: *Gregory, Rowcliffe & Co., for E. G. Finch, Liverpool.*

Cur. adv. vult.

BOTTOMLEY (Revenue Officer for West Derby Assessment Area) v. WEST DERBY ASSESSMENT COMMITTEE AND LIVERPOOL GRAIN STORAGE AND TRANSIT COMPANY, LIMITED (Occupiers).

SAME v. SAME.

These were two appeals from decisions of the Divisional Court upon cases stated under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, by a Court of Quarter Sessions for the County Palatine of Lancaster at the instance of the Revenue Officer for the West Derby Assessment Area, who appealed from decisions of the Assessment Committee for the said Assessment Area including in the special list for the Rating Area of the Bootle Borough Council as freight-transport hereditaments, in the first case, certain grain warehouses numbered 1 to 3 Alexandra Warehouses, Strand Road, Bootle, hereinafter called "Alexandra Granary No. 1," and in the second case certain grain warehouses numbered 2 Alexandra Warehouses, Arctic Road, Bootle, hereinafter called "Alexandra Granary No. 2," both hereditaments being occupied by the Liverpool Grain Storage and Transit Company, Ld., hereinafter called the Occupiers.

2. The following facts were admitted or proved:—

A. Benjamin Green Bottomley is the Revenue Officer for the West Derby Assessment Area.

B. Alexandra Granary No. 1 is situate in Strand Road, Bootle, and occupies an island site bounded on the North by Lyster Road, on the East by Arctic Road, on the South by Strand Road, and on the West by Regent Road. Alexandra Granary No. 2 is situate in Arctic Road, Bootle, and occupies an island site bounded on the North by Lyster Road, on the East by Back Strand Road, on the South by a passage, and on the West by Arctic Road. Each hereditament consists of a ground floor and top floor, with the whole intermediate space filled with silos constructed in honeycomb fashion. Each hereditament has direct railway connection with the London Midland and Scottish Railway (incorporating three distinct services connected with the hereditament—namely, the Lancashire and Yorkshire Railway, the London and North Western Railway and the Midland Railway), and with the Mersey Docks and Harbour Board Railway. The hereditaments are used solely for the accommodation of grain imported into the port of Liverpool.

C. The hereditaments together with the Coburg Granary at the Coburg Dock, Liverpool, Transit Silo No. 1, at No. 1 Branch, Alexandra Dock and Transit Silo No. 2, at No. 2 Branch, Alexandra Dock, were acquired and are solely occupied and used by the Occupiers for the purpose of facilitating the handling of grain passing through the port of Liverpool. None of the grain accommodated in the said hereditaments or the other silos or granaries belongs to the Occupiers.

D. The Occupiers are the only private company in the country providing the said facilities, which are in other

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ports solely provided by the port authorities. In addition to providing the said facilities for the handling and accommodation of grain the Occupiers act as stevedores, master porters, and forwarding agents.

E. All grain received in the hereditaments arrives in bulk by vessel or lighter at Alexandra Dock either Branch No. 1 or No. 2 alongside the Occupiers' transit silos. The grain is taken out by means of grain elevators, and is carried to the top of the transit silos and there automatically weighed, and then by means of travelling bands may be conveyed to any part of the transit silos, or to one or the other of the hereditaments. The travelling bands from the two silos to Alexandra Granary No. 1 are contained in an underground passage, and the travelling bands from Alexandra Granary No. 1 to the Alexandra Granary No. 2 are contained in an overhead passage. The two transit silos are specially equipped with elevating machinery for unshipping grain in bulk from vessels or lighters which come alongside. The elevators for the two transit silos are capable of discharging 10,000 tons of grain in an eight-hour working day. The total capacity of the two transit silos is 4500 tons. The total capacity of the two silos and the two hereditaments is 76,500 tons. The grain trade is seasonal. The busy periods are March and April and October to December, during which time the grain elevators are usually working at their full capacity. The grain is very rarely retained in the transit silos, but is passed on in a continuous course from the vessel or lighter to one or the other of the hereditaments, from which it is delivered as and when required.

F. The grain is delivered either to vessel or lighter by returning along the travelling bands to the transit silos or to railway or road vehicles, being sometimes bagged before delivery. Approximately one-third of the grain received goes out by water. The discharging capacity by water, rail, and road, of the grain so received is 2533 tons in an eight-hour working day.

G. The hereditament in each case is held on a long lease from Lord Derby. The two transit silos are held under a lease from the Mersey Docks and Harbour Board. The leases are exhibited to and form part of this case.

H. The Occupiers charge a rate for the storage and warehousing of grain in the hereditament and in the other premises. Of the Occupiers' total revenue 62 per cent. is derived from charges for receiving, weighing, stevedoring, master porterage, and delivery, and 33 per cent. from charges for storage and warehousing.

J. There are annexed hereto as part of these cases (i.) plans marked A showing the situation of the hereditaments and the two transit silos, (ii.) a copy of a lease from Lord Derby dated October 25, 1895, marked B; (iii.) a copy of a lease from the Mersey Docks and Harbour Board dated May 11, 1922, marked C; and (iv.) a table marked D showing the average length of time grain remains in the hereditaments. [This showed that 65 per cent. of the grain received had been forwarded at the end of one month and 84 per cent. at the end of two months.]

3. The Revenue Officer contended in each case:—

(*a*) That the respective hereditament is not a freight-transport hereditament within the meaning of s. 5 of the Rating and Valuation (Apportionment) Act, 1928, on the grounds

(*b*) that it is not occupied and used wholly or partly for dock purposes as part of a dock undertaking or for dock purposes within the meaning of the said section;

(*c*) that the Occupiers are not a dock authority within the meaning of the section;

(*d*) that the hereditament is not a dock within the meaning of the section;

(*e*) that it is not used for dock purposes and is primarily occupied and used for the purposes of wharfingers and warehousemen;

(*f*) that the business carried on at the hereditament does not comprise a dock undertaking inasmuch as the Occupiers are not a dock authority, and the business carried on at the hereditament is not carried on at and in connection with a dock.

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(*g*) Alternatively :—

(i.) that if the hereditament is a freight-transport hereditament, the net annual value thereof should be shown in the valuation list as being apportioned between occupation and user for transport purposes and occupation and user for other purposes ;

(ii.) that the hereditament should not be deemed to be occupied and used for transport purposes by reason of the proviso to s. 6, sub-s. 3 (*b*), of the said Act inasmuch as it is a building, yard, or other place primarily occupied and used for warehousing merchandise not in the course of being transported ;

(iii.) that the merchandise taken to the hereditament has arrived at the destination to which it was consigned and that it is there warehoused for the consignees' convenience ;

(iv.) that the hereditament is occupied and used not for transport purposes but as a warehouse, and that the Occupiers carry on there the business of wharfingers and warehousemen.

4. The Assessment Committee contended :—

(*a*) that the hereditament is a freight - transport hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928 ;

(*b*) that the hereditament is occupied and used wholly or partly for dock purposes as part of a dock undertaking ;

(*c*) that the whole or a substantial portion of the business of the Occupiers is concerned with the shipping and unshipping of grain not belonging to or intended for the use of the Occupiers ;

(*d*) that the hereditament is occupied and used for dock purposes within the meaning of the Act, and that the Occupiers being lessees of docks and wharves, namely the Alexandra Dock and the Coburg Dock in the port of Liverpool, are a dock authority within the meaning of the Act ;

(*e*) that the business carried on by the Occupiers in and upon the hereditament is carried on at or in connection with a dock undertaking of the Occupiers within the meaning of the Act;

(*f*) that the hereditament is not primarily occupied and used for the purposes of the business of wharfingers or warehousemen, but is primarily occupied and used for the purposes aforesaid and other purposes incidental thereto;

(*g*) that the hereditament is primarily occupied and used for the handling of grain in the course of being transported.

5. The Occupiers repeated the contentions of the Assessment Committee.

6. The Quarter Sessions dismissed the appeals and ordered that the hereditament in each case should remain in the special list.

7. The question for the opinion of the Court was whether upon the facts the Quarter Sessions came to a correct determination or decision in point of law.

8. If the Court should answer the question in the affirmative the order should stand; if not, the Court was respectfully requested to reverse or vary the order or to make such order as the Court should think fit.

The Divisional Court (Lord Hewart C.J. and Avory and MacKinnon JJ.) dismissed the appeals of the Revenue Officer and ordered that the hereditament in each case should remain in the special list.

The Revenue Officer appealed.

In these cases the judgment of the Divisional Court was given and entered in the Crown Office on January 23, 1931; it was drawn up and sealed on February 26; on March 5 notice of appeal was entered.

Lynskey K.C. and *F. A. Sellers* for the respondents took the same objection to the hearing of the appeals as in the preceding case.

Wilfrid Lewis (*Sir William Jowitt A.-G.* and *Colin H. Pearson* with him) for the appellant. The judgment of the Divisional Court was not perfected until February 26: *In re Helsby* (1); *River Thames Conservators* v. *Kent.* (2) The notice of appeal was therefore in time.

(1) [1894] 1 Q. B. 742.

(2) 59 Sol. J. 612.

The Court decided to hear the appeals as in the preceding case.

Upon the main point :—

Wilfrid Lewis (*Sir William Jowitt A.-G.* and *Colin H. Pearson* with him) for the appellant. Neither of these hereditaments is a freight-transport hereditament, because neither is used "for dock purposes." "Dock purposes" are purposes connected with the shipping or unshipping of (among other things) merchandise "at a dock." Para. 2 E of the special cases describes how the grain is carried from the Alexandra Dock by means of elevators to a point where it is weighed, and from thence by travelling bands to the silos. These are in fact warehouses the purposes of which have no connection with the shipping or unshipping of passengers or goods.

Lynskey K.C. and *F. A. Sellers* for the respondents. Paragraph 2 C of the special cases states that the hereditaments are solely used for the purpose of facilitating the handling of grain passing through the port of Liverpool. The respondents act as stevedores and master porters. There is ample evidence on which the Divisional Court could infer that these hereditaments were occupied partly for dock purposes. If so, they are freight-transport hereditaments within s. 5 of the Act. They remain in their entirety freight-transport hereditaments within s. 6, sub-s. 3 (*b*), unless part of them is "primarily occupied and used for warehousing merchandise not in the course of being transported." On the facts stated no part can be said to be so occupied or used.

Wilfrid Lewis in reply.

Solicitor for the appellant : *The Treasury Solicitor.*

Solicitors for the respondents : *Gregory, Rowcliffe & Co., for Laces & Co., Liverpool.*

Cur. adv. vult.

JUDGMENTS.

June 8. The following written judgments were delivered :—

SCRUTTON L.J. This group of seven appeals brings before this Court for the first time the question of freight-transport hereditaments under the Derating Acts. These hereditaments are divided by s. 5 of the Act of 1928 into: (1.) Hereditaments used wholly or partly for railway transport purposes; (2.) hereditaments used wholly or partly for canal transport purposes; (3.) hereditaments used wholly or partly for dock purposes. The appeals in question relate to the third class, and for "the purposes of transport," made prominent in the cases of railways and canals, there are substituted in the cases of docks "all purposes connected with shipping and unshipping at a dock of passengers and their luggage, or of carriages, parcels or merchandise." Why "carriages" have separate mention I do not understand. Again, why "purposes connected with conveyance or transport" of goods "by a railway forming part of a dock undertaking" are mentioned, but not transport by dock carts or mechanically propelled lorries, I do not understand. Further, it is clear that Parliament did not intend to give the benefit of derating to some kinds of warehouses in docks—namely, places "primarily occupied and used for warehousing merchandise not in the course of being transported," but did intend to give it to premises connected with the purposes of "shipping and unshipping." In shipping the shipper brings the goods into the dock from the land for the purpose of putting the goods on board a ship, work which may be done either by the dock company or the shipowner. In some cases the goods may be already in the dock warehouses, and may have been put there in the first instance to wait for transhipment into a known ship or destination, or, on the other hand, to wait till the receiver should decide to what destination he would send them. In unshipping the ship is bound to deliver to the receiver according to the contract of carriage, and the work of delivery may be done either by the servants of the dock or the ship. The delivery may be into a warehouse. In that case the receiver may have already determined where the goods are going, and the goods may only wait in the warehouse for a short time in course of the already determined voyage. On the other hand, the receiver may not have sold the goods or determined where they are going, and the goods may stay in warehouse till the receiver has determined their destination, sometimes for years, frequently for months. Under these circumstances, whether premises are connected with shipping and unshipping, and so entitled to derating, or with warehousing not in course of transport, and so not entitled to derating, may vary with the practice in every dock and have to be determined by a consideration of the special facts of each dock, and the special relations between ship and receiver. Speaking generally, there will be no warehousing not in the course of transport until the ship delivers to the receiver. The shipowner may warehouse in the course of transport where a through bill of lading is concerned, which requires the goods to wait in a dock warehouse for transhipment. But when the shipowner has delivered to the receiver, the receiver may be either sending on from the warehouse at once in a predetermined transport, or he may be waiting and keeping the goods in warehouse because he does not know where the goods are going to, or to whom he shall sell them. This latter class of warehousing seems to be pointed at by the proviso (*b*) to s. 6, sub-s. 3, excluding premises from derating primarily occupied for warehousing merchandise not in course of being transported.

I doubt whether the persons who drafted and passed this Act considered in detail the work done in docks, and I am clear that the language they used has made it difficult to ascertain their meaning. For instance, in s. 5, sub-s. 2 (*c*), in defining " dock purposes " they have, except in the case of dock railways, omitted the word " transport," and made the relevant matter " purposes connected with shipping or unshipping," yet when in s. 6, sub-s. 3 (*b*), they come to except a building primarily used for warehousing, they recur to the words " for transport purposes." It is necessary, therefore, to examine closely each hereditament and the purposes for which it is used. The hereditaments are :—

I. The Stanley Warehouses, building used as a bonded warehouse for tobacco.

II. The floors other than the quay floor of the warehouses in the Wapping Dock, used principally as a bonded warehouse for tobacco and sugar.

III. The Albert Warehouses, used as a bonded warehouse for wine and spirits, tobacco and sugar.

These three are bonded warehouses, No. II., Wapping, having the special feature that the ground floor, for very relevant reasons referred to hereafter, is separately rated as part of a quay and water space hereditament and has been given the benefit of derating without appeal.

IV. A wool warehouse in Great Howard Street not actually connected with any particular dock, and not a bonded warehouse.

V., VI., and VII. Three grain warehouses of which No. V. belongs to the Mersey Docks and Harbour Board, and is situate adjoining the East Waterloo Dock, and VI. and VII. are warehouses belonging to the Liverpool Grain Storage and Transit Company, Ld., and called the Alexandra Warehouses, at Bootle.

The Assessment Committee placed in the special list hereditaments II., IV., V., VI. and VII., but refused so to deal with hereditaments I. and III. On appeal the Recorder of Liverpool placed I. and III. in the special list, and dismissed the appeal in cases of II., IV. and V. The Quarter Sessions for the County of Lancaster dismissed the appeal in the cases of VI. and VII. The Divisional Court dismissed the appeals in the three grain cases, V., VI. and VII., but allowed the appeals in the first four (the three bonded warehouses and the wool warehouse), and removed these hereditaments from the special list of premises entitled to be derated. The Harbour Board appeal in the first four cases; the Revenue Officer in the last three.

It is convenient to deal with the three bonded warehouses —Stanley, Wapping and Albert—first and together. These three special cases were all stated by the Recorder of Liverpool after submission to the parties, but unfortunately a finding of fact (paragraph 2 D) got into the cases which, as the parties agreed before us, was both inaccurate and incomplete. The parties therefore agreed on an Addendum as to each warehouse, stating the actual facts as to each warehouse in respect to the position of the ship and the receiver, with references to the appropriate pages of the Rate Book. They also agreed that all technical objections to the insertion of this Addendum in the special case, without that case having been sent back to the Recorder, should be waived. This might have raised serious difficulties if any finding of pure fact by the Recorder was affected by the Addendum. But the only finding of fact possibly so affected might be the statement in paragraph 5 of all the special cases that "no part of the said hereditaments was primarily occupied and used for warehousing merchandise not in the course of being transported." This is meant to negative the application of s. 6, sub-s. 3 (*b*), but appears to me to proceed on an erroneous construction of that paragraph and especially of the word "transported." It is probably true that nearly all goods that go into a dock warehouse will ultimately go out. Goods are not put into warehouses to stay there for ever. They are put into warehouses to stay till their owner is ready to take them out, because he has sold them, or determined a destination for them which he did not know when he put them in warehouse, and therefore warehoused them till he did know on what fresh transit he would send them. This is especially true of bonded warehouses where the owner of goods leaves them for some time, because, when he takes them out he will have to pay duty on them, and where, not having sold them, he does not then want to transport them any further. So he warehouses them not in the course of transport. The useful graph D in the special case of the Wool Warehouse shows that in the Stanley bonded warehouse over 50 per cent. of the tobacco sent in stays more than a year, and over 80 per cent. stays more than six months. The percentages in the Wapping and Albert Warehouses are reduced by the fact that in the Wapping Warehouse sugar is stored as well as tobacco, and in the Albert Warehouses sugar and wines and spirits as well as tobacco. But in the Albert Warehouses about 65 per cent. of the mixed goods stay more than three months in warehouse, and in the Wapping Warehouse 59 per cent. so stay. In view of these figures the Recorder's finding of fact seems to be based on his construction of "in course of transport" as covering a case where goods in warehouse will go out some day, however distant, and that any waiting, however long, till the goods go out does not prevent the warehousing being in course of transport. This finding of the Recorder's, turning as it does on the view he takes of the expression in the statute "in course of transport," is, in my opinion, a mixed question of fact and law and therefore open to review by the Court.

A somewhat similar question arises in the cases on stoppage in transitu in determining where the transit ends. It is held that when the vendor can give no further instructions as to transit, but the goods are in the hands of the vendee or his agent, the transit is over: compare *Dixon* v. *Baldwen* (1) and *Ex parte Miles* (2) with *Bethell* v. *Clark*. (3) If the vendor is forwarding under a through bill of lading the transit is not over, and a detention in warehouse till the goods can be sent forward by transhipment would be in course of transport; but if the goods have reached the receiver, who warehouses them because he is not then proposing to send them on, the goods in my opinion are not then in course of transport.

The ordinary form of bill of lading for tobacco is "to be delivered to King's Warehouse at owner's risk but ship's expense." The shipowner at Liverpool therefore pays the stevedore and master porter for delivery into the warehouse. When the goods are taken from the shipowner's carts—i.e., those he pays for—into the warehouses by the servants of the Harbour Board, the receiver or consignee pays either the consolidated rate or a rate called the Transitu Rate (pp. 89 and 90 of the Rate Book). The consolidated rate covers rent for a year. The smaller transitu rate, if claimed before the goods come in, covers only four weeks' rent. The greater proportion of tobacco in the three warehouses pays the consolidated rate, because it is going to stay more than four

(1) 5 East, 175.
(2) (1885) 15 Q. B. D. 39.
(3) (1888) 20 Q. B. D. 615.

weeks. In the Wapping Warehouse 77 per cent. of the tobacco pays the consolidated (year's rent) rates. In the Albert Warehouse 87 per cent., and in the Stanley Warehouse 79 per cent. of the tobacco pay the consolidated rate. Graph D shows the very substantial time the goods stay in the warehouse. Apparently the goods are sorted to marks in the warehouse, but the shipowner does not pay anything for this operation, which is covered by the consolidated rate paid by the consignee.

The Stanley bonded warehouse is entirely devoted to tobacco, but in the Albert and Wapping Warehouses there are also bonded sugar and wine. As to sugar in the Albert Warehouse, it is sorted to marks on the quay by a master porter paid by the consignee who also pays for its transit to warehouse by land carriage. At Wapping a slightly different practice exists. The small quantity of sugar that comes by road vehicles is treated in the same way as at the Albert Warehouse. But the bulk of the sugar at Wapping is discharged ex ship on the open ground floor of the warehouse, which is practically quay. The master porter paid by the consignee there sorts to marks. In my opinion the sugar ceases to be in course of transport when the consignee puts it into bonded warehouse. Wine and spirits are in bond at the Albert Warehouse. The master porter receives the goods on the quay, sorts to marks, and delivers to the warehouse, the consignee paying for all these services.

All the docks, as to water, space and quay space, are rated as one hereditament stretching for miles along the Mersey. Owing to the peculiar open structure of the ground floor of the Wapping Warehouse as shown in the photograph in the Rate Book, the ground floor is treated as quay space and included in the special list for derating as part of the dock and quay hereditament. The special case before us as to Wapping is limited to the four upper floors of that warehouse.

On these facts, for the reasons given, I am of opinion that these three bonded warehouses are not subjects for derating. The great bulk of the goods received in them are not received for or in course of transport. They are received because their transport is to stop. The consignee has received them but does not want their transport to proceed. He does not know where they are going, nor does he yet want to pay duty on them; he therefore stores them in bond, often for a very substantial time. The warehouse is primarily occupied and used for warehousing merchandise not in course of transport, and is excluded from derating. I therefore agree with the result arrived at by the Divisional Court as to these warehouses, though as they have not given reasons for their decision, and indeed had not before them the detailed facts before us, I may have arrived at the same result as they did for different reasons. In my view, it can only be in the most unusual cases that a bonded warehouse would be entitled to the benefit of derating.

No point appears to have been raised in the Courts below on the original special cases as to the effect of a shipowner claiming a lien for freight on goods in a warehouse. It appears from passages in the Addendum that, as in the case of tobacco in casks, the shipowner has to deliver into the bonded warehouse, the Harbour Board do not deliver out to the consignee without a delivery order from the shipowner, who of course will not give it till all freight due is paid. The goods are entered in the name of the consignee with a note as to the shipowner's lien for freight. All charges in the warehouse are paid by the consignee and nothing by the shipowner. As the point was not raised below I do not express any final opinion on it, but at present I do not think that any incidental use of the warehouse in preserving the shipowner's lien is for a purpose connected with unshipping so as to require apportionment of the warehouse for the purpose of derating any more than the use of the warehouse for the purpose of collecting Customs duties, though postponing the time of their payment, is a purpose connected with unshipping.

IV. WOOL.

The wool warehouse in Great Howard Street stands in a different position. It is obviously used as a storage place for wool about to be sold at the regular wool sales, about eight a year at six weekly intervals, and as a place at which the consignee can prepare the goods for sale and for inspection by intending buyers. The shipowner delivers the wool to the master porter on the quay, and the Dock Board conveys the wool in its vehicles to the warehouse, the consignee paying a charge to the master porter, and a consolidated rate to the Dock Board, including carriage. The goods are sorted to mark in the warehouse, but the consignee pays for this operation in the consolidated rate. The shipowner does not pay anything for the work in the warehouse. The detailed operations of sampling and preparing for sale are stated in the Addendum. We were told that some wool might not be sold and might remain in the warehouse for a second sale, and that the buyer might leave the goods in warehouse on rent till he was prepared to take them. But it is clear from the graph that most wool goes out of warehouse when sold. Two-thirds of the wool is out by the end of a month, and 85 per cent. by the end of two months. Four per cent. is in the warehouse at the end of the year. The time the wool is in warehouse of course depends on the date of its arrival, compared with the date of the next available sale.

It seems to me clear on the facts stated that the warehouse is not used "for or in course of transport" within the meaning of the Act, but as a room for preparing for sale, and for sale. The consignee has received the goods and proposes to sell them to some unknown buyer, who alone will settle the destination. This is storage for sale, not in course of transport. I therefore agree with the view of the Divisional Court that this wool warehouse is not the subject of derating, and this Court has before it a number of details of fact which the Divisional Court had not before it.

V., VI., VII.—GRAIN WAREHOUSES.

The special feature of these three warehouses, two of which belong to the Liverpool Grain Storage and Transit Company, and one, the warehouse in the East Waterloo Dock, to the Harbour Board, is that part of their structure is an elaborate elevator by which grain is discharged from ships, barges or carts into warehouse or silo and moved out again into sea or land vehicles. The photograph in the Company's book illustrates the kind of machinery, and I do not specially describe it. The illustration on p. 26 shows the very elaborate system by which different parcels of grain are carried to their special bins. It is obvious that part of the user of the warehouse silo and elevator is for shipping and unshipping. It is further clear from the Rate Books that the owners of the hereditaments contemplate that grain may, after being unshipped, stay a very short time in the warehouse. There seem to be three rates (see Harbour Board Rates Book, p. 82; Company's Rate Book, p. 28). The first of them is charged to the consignee for receiving and three days' free rent; this assumes that the grain will go out of warehouse almost at once. A second and higher rate gives six days' free rent. The third and highest specifies no period of stay, but is followed by a weekly rent. Unfortunately there are no figures to show what proportion of grain uses the three or six days' free rent charges, which might be very material in deciding whether the hereditament is primarily or mainly used for warehousing merchandise not in course of being transported. The Harbour Board's graph D shows that 65 per cent. of the grain has gone out at the end of a month, and 84 per cent. at the end of two months, but not how much has gone out at the end of six days. As to the special cases, the two stated by the County Quarter Sessions on the Company's assessments, find that of the revenue of the Company 62 per cent. is from shipping and unshipping, and 33 per cent. from storage and warehousing. The cases do not expressly find that the hereditament is not primarily occupied and used for warehousing merchandise not in course of transport, but as the hereditament is derated that finding is involved. The Dock Board's case, stated by the Recorder of Liverpool, does find that the premises were not primarily occupied and used for warehousing merchandise not in the course of being transported. It is true that the case also finds as a fact that no part was

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primarily used for warehousing merchandise not in course of being transported. As some grain stays in the warehouse for a year and 16 per cent. for more than two months, this finding must turn on an erroneous construction of the word "transport," as I have already explained. But on facts found in the cases I cannot say that the other findings of mixed fact and law are wrong.

The appeals, therefore, in all seven cases must be dismissed with costs.

When the three grain cases were called on, two in our list relating to the Liverpool Grain Company, and one to the Mersey Docks and Harbour Board, the preliminary point was taken that the appeals were out of time, as the appeals had not been entered under Order LVIII., r. 15, within fourteen days from the time at which the judgment was "signed, entered, or otherwise perfected." To this two answers were made: (1.) That in the Company's two cases the appeal had been entered within fourteen days from the "perfecting" of the judgment. The dates were: January 23, judgment given and entered in Crown Office Book; February 26, judgment drawn up and sealed; March 5, appeal entered. The respondent relied on the decision of the Court of Appeal in *Higher Bebington Board* v. *Lightbound* (1), where the Court on the statement of the Crown Officials followed the then Crown Office practice of making the time run from the entry in the Crown Office book. The appellant relied on the two decisions of the Court of Appeal of *In re Helsby* (2) as to Chancery judgments, and *River Thames Conservators* v. *Kent* (3) as to King's Bench appeals, making the time run from the sealing and certifying of the judgment. We have enquired as to the present practice of the Crown Office, and find that when *Kent's* case (3) was decided in 1915, an entry was made in the Crown Office Practice Note Book that the time was to date from the sealing. But in 1917 a change took place when the entry of judgments and appeals was removed to the Central Office, see Order XLI., r. 2, and the time for appeal ran from the date of the entry, and not from the date of the delivery, of the judgment. The preliminary objection therefore failed as to the Company's cases, as the appeal was entered within fourteen days of the entry or perfecting.

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(1) 29 Sol. J. 500.

(2) [1894] 1 Q. B. 742.

(3) 59 Sol. J. 612.

There remained, however, the more difficult and important question arising on the Mersey Docks Board's grain case. Here the dates were January 23, judgment given; January 26, judgment perfected; March 5, appeal entered. Here the question whether the time for appeal was fourteen days or six weeks became vital, because, though we could and did extend the time for appeal in this case, it was important to have a certain rule for the future. Any certain rule is better than an uncertain one. The question turns on the meaning of Order LVIII., r. 15, which provides that an appeal from any order, whether final or interlocutory "in any matter not being an action," shall be brought within fourteen days after perfecting. By the Judicature Act, 1925, s. 225, an "action" is defined as a civil proceeding commenced by writ "or in such other manner as may be prescribed by Rules of Court." In the present case an objector had given notice of objection to a draft assessment of the Assessment Committee who, by the Local Government Act, 1925, s. 27, sub-s. 1, were bound to hear the objector and his witnesses, and give a decision (see s. 31, sub-s. 1). There appear to be no "Rules of Court" for this proceeding. The objector then had a right to appeal to Quarter Sessions. This proceeding is regulated by rules made under statutory authority by the Secretary of State (see s. 34); the Secretary of State has made such rules entitled the Rating and Valuation Act (Assessment Appeals) Rules, 1927 (see Konstam on the Rating Relief Acts, p. 271). Rule 9 provides that on the hearing of an appeal the appellant shall begin, a provision which is contrary to the ordinary practice of Quarter Sessions who re-hear the case, the prosecutor or claimant beginning. The Quarter Sessions can state a special case for the Divisional Court, and Rules of Court of course regulate the appeal to the Divisional Court, and the appeal from that Court which we are now hearing. (1.) Was this a civil proceeding? (2.) When was it commenced; before the Assessment Committee or by appeal to Quarter Sessions? (3.) Was it commenced as prescribed by Rules of Court?

(1.) In my opinion it was a civil proceeding; it was to ascertain the civil liabilities of a citizen; it was certainly not a criminal proceeding. (2.) In my opinion the proceeding was commenced when the objector called upon the Assessment Committee to hear him and his witnesses and to give a "decision" from which he could appeal. In my opinion the Assessment Committee could be ordered by mandamus to hear and determine. The prerogative writs will run to a body which is not "a Court," and it may be that like some kinds of Licensing Justices the Assessment Committee is not "a Court"; it does not hear evidence on oath and has no particular rules of procedure, though it acts under a statutory duty and authority (see the decision of Avory J. as to Licensing Justices: *Attwood* v. *Chapman.* (1) (3.) The proceedings in the Assessment Committee do not appear to be commenced under any Rules of Court, and the provision that the appellant begins in Quarter Session shows that the proceedings have already commenced by a decision against which there is an appeal to Quarter Sessions, and that the hearing in Quarter Sessions is not an original hearing on which there is a first decision.

For these reasons I think that this proceeding is not an "action" as already defined, and therefore that the time for appeal is fourteen days. This view is in accordance with the previous decisions about appeal by special case in *Austin Friars Steamship Co.* v. *Strack* (2) and *Onslow* v. *Commissioners of Inland Revenue.* (3) We have extended the time for appeal in this case, and the decision will therefore only be of importance to future appellants. But, as I said in *Rex* v. *Westminster Assessment Committee* (4), it is ridiculous and almost a scandal that the rules as to time of appeal should be so obscure and unreasonable that it is necessary to spend two or three hours in ascertaining what they are and what

(1) [1914] 3 K. B. 275.
(2) [1906] 2 K. B. 499.
(3) (1890) 25 Q. B. D. 465.
(4) [1917] 2 K. B. 215.

is their effect. I hope, and have reason to believe, that the Rule Committee may soon take some steps to put the rule as to time of appeal on a more simple and easily intelligible footing.

GREER L.J. These appeals turn on the right construction of ss. 5 and 6 of the Rating and Valuation (Apportionment) Act, 1928, and the right application of the sections when so construed to the facts stated in each of the seven cases. It is therefore convenient, before dealing with each case, to consider the wording of the two sections, and certain general matters relevant to their interpretation and their application to the facts stated in the several cases.

The full title to the Act describes it as : " An Act to make provision, with a view to the grant of relief from rates in respect of certain classes of hereditaments, for the distinction in valuation lists of the classes of hereditaments to be affected, and the apportionment in valuation lists of the net annual values of such hereditaments according to the extent of the user thereof for various purposes."

Sect. 1 requires that in every valuation list, three classes of hereditaments shall be distinguished from each other and from all other hereditaments. Every valuation list made after the Act came into force will therefore distinguish four classes of hereditaments, of which three are defined by the Act : (1.) agricultural hereditaments ; (2.) industrial hereditaments ; (3.) freight-transport hereditaments ; and (4.) all other hereditaments No relief from rates is granted by this statute, but it is plain from the title to the Act that the first, second and third classes of hereditaments were defined in the Act so that Parliament might, if it was afterwards so decided, grant some relief in rates to these three classes. It was suggested by the Attorney-General, in the course of his argument for the Revenue Officer in the various cases, that the Court was entitled to consider some of the provisions of the later Derating Act as affecting the construction of the 1928 Act. It was contended that as the later Act obliged railways to pass on the benefit of the derating by reduction of railway rates to the users of railways, the definition clauses of the 1928 Act should, if possible, be read as applying only to that part of their property which earned rates that could be reduced in proportion to the derating benefits received by the railway, and therefore the Act should, if possible, be read as excluding from the privileged classes warehouses for the use of which a customer pays rent and not railway rates, and therefore could not be given the advantage of having the derating benefit passed on to him. It was further argued that if railway warehouses are outside the definition for these reasons, dock warehouses should also be deemed outside the definition. In my judgment these arguments ought not to have any weight attached to them. The Act of 1928 cannot be interpreted by what Parliament chose to do by an Act of 1929. We are not entitled to assume that the need of so wording the Act as to confine the prospective advantages of differential rating to those hereditaments whose rateable occupiers could pass on the benefit to their trade customers, was present to the mind of the Legislature when they passed the Act of 1928. We can, however, treat as relevant the purposes for which the Act was passed as stated in the title: see the cases collected in Craies on Statute Law, 3rd ed., p. 176, especially *Dartford Rural District Council* v. *Bexley Heath Ry. Co.* (1), and per Lord Macnaghten in *Fenton* v. *Thorley.* (2)

These appeals are all concerned with warehouses which are claimed to be freight-transport hereditaments as defined by the Act. The relevant sections are ss. 5 and 6. But it is worth noting that the Act expressly excludes hereditaments such as warehouses primarily used for storage from the class of industrial hereditaments. One would not expect warehouses primarily used for storage to be included in another class of hereditaments intended to receive the full benefit of rating relief. Sect. 5 of the Act is the section in which the statutory definition of freight-transport hereditaments is contained. It is only in s. 6, which deals chiefly with apportionment, that we find the provision that freight-transport hereditaments are to appear as such in the valuation lists. Sect. 5, sub-s. 1, defines three classes of freight-transport hereditaments: (*a*) hereditaments occupied and used for railway transport purposes; (*b*) hereditaments occupied wholly or partly for canal transport purposes; and (*c*) hereditaments occupied and used wholly or partly for dock purposes. We are only concerned here with (*c*).

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(1) [1898] A.C. 210.

(2) [1903] A. C. 443.

Sub-ss. 2 and 3 contain definitions of some of the words used in sub-s. 1 (*c*). It will be convenient to set out in full the definition contained in sub-s. 1 (*c*) by substituting for the words there used the definitions contained in sub-ss. 2 and 3. Sub-s. 1 (*c*) will then read: "A hereditament used wholly or partly for purposes connected with the shipping or unshipping at a dock, harbour, wharf, pier, jetty or other works in or at which vessels can ship or unship merchandise or passengers as part of an undertaking carried on by a dock authority (including any other undertaking comprising as part thereof a dock, harbour, pier or jetty, etc., so far only as its business is carried on at or in connection with a dock)", etc. It is unnecessary to complicate the definition by including the definition of Dock Authority as it is incontestible that the Mersey Docks and Harbour Board is a dock authority, and it has been admitted for the purposes of these appeals that the Liverpool Grain Storage and Transit Company is a dock authority within the definition.

Sub-s. 1 of s. 6 contains the provision above referred to requiring freight-transport hereditaments occupied and used wholly for transport purposes to be shown in the list. The sub-section then goes on to deal with hereditaments that have been included in the definition because they are partly occupied and used for transport purposes, and then makes provision for apportionment of the net annual value of this kind of freight-transport hereditament. Freight-transport hereditaments are thus divided into two sub-classes: (1.) those that are wholly used for transport purposes; (2.) those which are partly used for transport purposes. The words of the sub-section as regards the second class are: "As respects every such hereditament occupied and used partly for transport purposes the net annual value thereof shall be shown in the prescribed manner as being apportioned between the occupation and user of the hereditament for transport purposes, and the occupation and user thereof for other purposes." In my judgment, considered by themselves, the words quoted do not mean to confine apportionment of annual value to cases in which the part occupation and user can be stated in terms of space. I think that the section contemplates apportionment not only by dividing the hereditament into separate parts to be separately valued, but also by proportionate user of the hereditament as a whole; that is to say, if a hereditament is used, say for one day a week for transport purposes, and for the rest of each week for other purposes, the annual value should be apportioned, just as it should be if one floor is always used for transport purposes, and the other floors always used for other purposes.

But I have still to consider the effect of sub-s. 3 and the proviso thereto. This seems to me the most difficult part of the Act to construe. Sub-s. 3 reads: "For the purposes of determining in what proportions a freight-transport hereditament is occupied and used for transport purposes and for other purposes, respectively, the hereditament shall be deemed to be occupied and used for transport purposes, except in so far as it is occupied and used for the purposes of a dwelling-house, hotel, or place of public refreshment: Provided that—(*a*) no part of a freight-transport hereditament which is so let out as to be capable of separate assessment shall be deemed to be occupied and used for transport purposes unless it is actually so occupied and used; and (*b*) in the case of a hereditament occupied and used for canal-transport purposes as part of a canal undertaking or occupied and used for dock purposes as part of a dock undertaking no part of the hereditament, being a building, yard, or other place primarily occupied and used for warehousing merchandise not in the course of being transported, shall be deemed to be occupied and used for transport purposes." Apart from the proviso, sub-s. 3 enacts that a hereditament partly used for transport purposes shall be deemed to be used for transport purposes, Greer L.J.

subject to certain exceptions. Apart from these exceptions, a hereditament, of which a small part only is used for transport purposes, would be entitled to be classed as a freight-transport hereditament and no apportionment could be claimed. So also a hereditament that was used on one day a week for freight-transport purposes would be a freight-transport hereditament in respect of which apportionment could not be claimed. There are however three exceptions, one contained in the sub-section apart from the proviso, and the other two in the proviso. The only exceptions that need be considered are those in the proviso. The effect of proviso (*a*) is that when you can point to a distinct part of the hereditament capable of being separately let, and therefore treated as a separate hereditament within the decision in *Mersey Docks and Harbour Board* v. *Overseers of Birkenhead* (1), and that part is so "let out," then that part is not, unless it is actually so used, to be deemed to be used for transport purposes. Thus the upper floors of a warehouse can be separately let and separately assessed, and if wholly used for transport purposes there would have to be an apportionment if the whole warehouse were included in one assessment. Proviso (*a*) obviously requires separation by metes and bounds, and probably by walls or floors, or some physical dividing lines. In my opinion the effect of proviso (*b*) is that if you find a building, yard, or other place, which is partly occupied and used for transport purposes, but is primarily occupied and used for warehousing merchandise not in the course of being transported, then no part of that building, yard, or other place is to be affected by the restraint on apportionment enacted by sub-s. 3, but it remains subject to the provision as to apportionment contained in sub-s. 1, that is to say, it is taken out of sub-s. 3, but is left to be dealt with under sub-s. 1 without the gloss put on the operation of that sub-section by sub-s. 3. The net annual value must then be apportioned. In many cases the place used for warehousing merchandise not in the course of being transported may be a part of a larger hereditament, and definable by metes and bounds, and in these cases there will be no difficulty in making an apportionment. There is great difficulty in applying this proviso to the case where the hereditament that is rated is a warehouse partly used for transport purposes but primarily used for warehousing merchandise not in the course of being transported, the part user not being determined by metes and bounds. Though difficult, the task is not impossible, and in my judgment the Act requires it to be done.

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(1) (1873) L. R. 8 Q. B. 445.

It should also be borne in mind that the Act is not dealing with transport purposes generally, but only with three kinds of transport, transport by canal, transport by railway, and transport so far as it is included in the definition of dock purposes. The fact that goods in a warehouse are intended sooner or later to be moved elsewhere does not make them while in warehouse "in the course of being transported" within the meaning of the Act. The learned Recorder of Liverpool seems to have attached too wide a meaning to the words "in the course of being transported."

Another problem it may be necessary to solve in order to decide some of these appeals is the problem involved in the question, when is an inference from stated facts to be treated as a question of law, and when is it to be treated as a question of fact? The general rule is stated by Lord Parker in *Farmer* v. *Cotton's Trustees* (1) in the following words: "Where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only." In a case under the Workmen's Compensation Act: *Herbert* v. *Samuel Fox & Co.* (2): Lord Wrenbury applies the same rule in these words: "The first questions are, what are the facts which the county court judge has found, and was the sentence I will read in a moment a finding simply of fact. The judge does not state the law as he understands it and is about to apply it, but says simply 'I find the accident arose in course of and out of employment.' In that sentence he is not finding simply a fact; he is finding that from certain facts there results a certain conclusion of law. If there is no evidence to support the finding of fact, or if the facts found do not support the conclusion of law, the decision is appealable." On the other hand, when dealing with a case under the Income Tax Acts (1) in which the question was whether certain disbursements, expenses, and money foregone, were "money wholly and exclusively laid out and expended for the purposes" of a brewery trade, Lord Sumner said "though the answer to the question may itself be an inference from a wide area of facts, it is an answer of fact." I do not think Lord Sumner intended to lay down a general rule that in all cases it is an inference of fact. Where a statute draws, when rightly construed, a definite line, and the material facts found by the tribunal of fact show that the case is on one side of that line, the tribunal of fact is not entitled to draw an inference of fact that it is on the other side of the line. If it did so its decision would necessarily involve a decision not to apply the provisions of the statute rightly construed. There are, however, many cases where the statute does not when rightly construed draw a definite line, and the question whether the indefinite line has been crossed becomes one of degree, and may be one of fact. If, for example, a statute provides that a contract by an infant shall be void, no tribunal of fact could infer as a fact that an individual proved to be only 20 years and 364 days old was bound by his contract. But if a statute should place an obligation on all men of middle age, it could be definitely ruled as matter of law that a man of twenty-one is not a person of middle age, but if the man was between forty-five and fifty-five, then the inference of the tribunal one way or the other would probably be an inference of fact. I do not think Lord Sumner meant any more than is implied in the above illustration. If he did, I prefer the statement of law as laid down by Lord Parker in the words I have quoted. I have dealt with this question because it may be necessary to apply the rule to the case of the *Liverpool Grain Storage and Transit Co.*, where it may be necessary to determine what is the primary purpose for which

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(1) [1915] A. C. 922, 932.

(2) [1916] 1 A. C. 405, 419.

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(1) *Usher's Wiltshire Brewery, Ld.* v. *Bruce* [1915] A. C. 433, 466.

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the hereditament is occupied and used. As in the cases which have already been decided with regard to industrial hereditaments, I think we must treat " primary " as meaning the main or principal use to which the hereditament is put, and not the ulterior purpose of the occupiers. In such cases the evidence may show beyond question that the principal use is either for transport purposes, or for warehousing goods not in the course of transport. In this event any tribunal deciding otherwise would be wrong in law. On the other hand, the evidence may show that the user is nearly balanced between the one and the other, and in this case, in my view, the question would be one of fact, and the decision of the Quarter Sessions could not be reviewed by the High Court on a case stated.

Those responsible for the wording of s. 5 of the Act evidently intended to make it easy, by successive definitions of the words and phrases used, to determine the classes of hereditaments that were to receive relief from rates as freight-transport hereditaments. Unfortunately, notwithstanding the efforts of the draftsmen to leave no uncertainty in the definition, they left in the definition the vague phrase " purposes connected with the shipping and unshipping of merchandise." It would have been useful if we could have rested our decision in these appeals on some principle which would have laid down once and for all a clear dividing line between hereditaments occupied and used for purposes connected with shipping or unshipping of merchandise, and hereditaments occupied and used for purposes not connected with shipping and unshipping of merchandise. I have tried to do this but without success. I think we must be content to deal with the facts of each case as it is presented for decision.

The first of these appeals was concerned with the Great Howard Street Wool Warehouse, of which the Dock Authority of the Port of Liverpool are the rateable occupiers. Whatever may be the exact meaning of the words " in connection with the shipping or unshipping of merchandise," they do not, in my judgment, extend to include the purposes for which this warehouse is occupied and used. On the facts originally stated in the case, together with the additional facts stated by agreement between the parties, it appears that the wool is received at the dock by the consignees acting by the master porter, whose charges they pay; is then carted by carters employed by the Dock Board, who are paid for this service by the consignees; is then delivered to the warehouse, where various operations are carried out to enable the wool to be properly sorted, weighed, sampled, and lotted for sale, all of which are done by the servants of the Board for the benefit of and are paid for by the consignees. Rent is charged to the consignee from the time his goods first come to the warehouse until they leave it. Rather more than three-fifths of the wool so received usually leaves the warehouse within a month from its arrival there, but a small proportion remains as long as twelve months. It is true that sorting to bill of lading marks takes place on the ground floor of the warehouse before the wool is taken to the upper floor, where it is placed in piles in the order of lotting numbers supplied by the brokers: see paragraph iii. of the Addendum. The returns there referred to could not be made up without sorting to marks. But this work is paid for by the consignee in the consolidated rate. By the practice of the port which has been accepted by the trade, the consignees are content that the master porter should receive the wool at the dock on behalf of all the consignees without calling on the ship to sort to marks, and the consignees undertake the work of dividing the bales between the different receivers. In my judgment, on these facts the warehouse was not occupied or used for purposes connected with the unshipment of goods. The wool deposited in this warehouse was not there "in connection with" its "unshipping." The warehouse is not, on the facts stated, occupied and used for purposes, e.g., uses, "connected with the unshipping" of the wool within the meaning of the Act. The purposes for which it is occupied and used are wholly concerned with the business of the wool importer, after everything connected with the unshipment of the goods has been completed. I agree that this appeal should be dismissed.

With regard to the cases relating to the Stanley Warehouse, the Albert Warehouse, and the Wapping Warehouse, I am inclined to think that if the Recorder had been asked to order these warehouses to be put in the special list and there apportioned, such an order would not have been wrong in law having regard to the facts now stated in the Addendum. So far as the warehouses are used for receiving and storing tobacco in bales and cases, sugar, and wine, the case is similar to the wool case. The warehouses are to that extent not being used for dock purposes, and are being used for warehousing goods not in the course of being transported. I can see no distinction between the use of the warehouses for these purposes, and the use to which the wool warehouse is put. But 90 per cent. of the tobacco received and stored in these warehouses is tobacco in casks, shipped on bills of lading requiring delivery to the consignee at King's Warehouses (i.e., bonded warehouses). The shipowner pays the master porter's charges, and also pays for the cartage from quay to warehouse. But even when the goods are received into the warehouse the shipowner has not finished with them. Paragraph ii. of the Addendum contains this sentence: "During the receipt of the tobacco into the warehouse the shipowner notifies the Occupiers in writing that he has a lien on the tobacco pending the production of bills of lading and payment of freight, and in some cases instructs the Board that the tobacco is to be stored in the shipowner's name and held to his order." Paragraph iii. contains the following statement: "In due course the consignee produces a delivery order signed by the shipowner and addressed to the Board in favour of the consignee. This has the effect of removing the stop placed upon the goods by the shipowner at the time of their receipt into the warehouse, and until the delivery order is presented the consignee cannot get delivery of the tobacco." I cannot read these statements as referring to exceptional occasions. They seem to me to state what is the general course of business. The probable explanation of this exceptional treatment of tobacco in casks is that as the ship has to deliver to warehouse, the consignee does not want to take over his goods at any time before the shipowner has completely performed his contract of carriage. Then having ascertained that the goods are in warehouse, he pays his freight and gets his delivery order. But for some appreciable time the tobacco in casks is held in the warehouse subject to the shipowner's lien, and for the purpose of enabling him to collect his freight. I am disposed to think that the warehouses are partly used for dock purposes, that is to say, for purposes connected with the unshipping of merchandise. The tobacco continues to be in the course of being transported to the consignee until he presents a delivery order, and so frees the goods from the shipowner's lien. Thereafter, so far as any particular parcel is concerned, the warehouse is being used for warehousing merchandise not in the course of being transported. But once the hereditament is within s. 5, it cannot be entirely taken out by the proviso to s. 6. For reasons stated in the earlier part of my judgment, I think that the proviso (*b*) merely saves the warehouse from being deprived of the right to have the rateable value apportioned. Every part of the warehouse in which tobacco in casks is placed is primarily used and occupied for warehousing merchandise not in the course of being transported, and is also secondarily, and in a small degree, used for purposes connected with the unshipment of merchandise. It is therefore taken out of sub-s. 3 of s. 6; it is not, because one of its uses is for transport purposes, to be deemed to be occupied and used for transport purposes, as it would have been if the proviso had not been in the Act. But it is still subject to sub-s. 1 of s. 6, and its net annual value must be apportioned. This question of apportionment only arises by reason of the facts stated in the Addendum. As facts are there stated which raise the question, I have thought it right to express my opinion on it. But this ought not to affect the result of these appeals, as the point was not raised in the hearing of the appeal by the Recorder, and he has not so drawn the case as to raise the question, nor was it raised on the argument in the Divisional Court or before us. Under these circumstances I agree that the decision of the Recorder that the case should remain in the special list simpliciter was wrong in law, and that on the facts stated by him the Divisional Court were right in allowing the appeal, and this Court ought not to interfere with their decision.

With regard to the Grain Warehouses, for the reasons stated in the judgment of Scrutton L.J., I agree that these appeals should be dismissed. The hereditaments are partly used for purposes connected with unshipping the grain, i.e., as a convenient method of delivery to the consignee, in other words, as plant for the purposes of shipment and unshipment, and I cannot say that the Recorder was wrong in law in deciding that no part of the Dock Board's grain warehouses was primarily occupied and used for warehousing merchandise not in the course of being transported. Nor can I say, in the case concerning the warehouses of the Liverpool Grain Storage and Transit Company, that the County Quarter Sessions were wrong in law in dismissing the appeal from the decision of the Assessment Committee. As they dismissed the appeal they must be taken as having decided that the hereditament was partly occupied and used for dock purposes, and no part of it was primarily used for warehousing goods not in the course of being transported. In my opinion we must treat the decision of the Recorder and that of the County Quarter Sessions as turning on inferences of fact.

With regard to the preliminary points raised in the three appeals relating to grain warehouses, I agree that the time allowed for appealing, whether it be fourteen days or six weeks, runs from the date when the judgment was perfected by being drawn up and sealed, and the appeal in the case of the Liverpool Grain Storage and Transit Company was in time, even if the time applicable be only fourteen days. With regard to the question involved in the appeals concerned with the Dock Board's Grain Warehouses, I am not sure that I agree with my brethren that the time prescribed is fourteen days. The point is of no importance to those interested in these appeals, as we decided in any event to extend the time so as to enable the appeals to proceed. If the case in which this point arose should go to the House of Lords, the question will not arise there for decision, nor is a question of this kind ever likely to be carried to that final tribunal. Under these circumstances, it appears to me that it will serve no useful purpose to explain at length my reasons for hesitating to agree with my brethren on a question on which their decision will in all probability finally settle the point of practice with which it is concerned until the relevant Rule is amended by the Rule Committee.

In the result I agree with the conclusion which Scrutton L.J. has expressed in his judgment in all these cases.

SLESSER L.J. These appeals raise questions which involve the proper construction of those parts of the Rating and Valuation (Apportionment) Act, 1928, which deal with hereditaments occupied and used for certain purposes connected with railways, canals and docks. The scope of this statute has received the consideration of the House of Lords in *Moon* v. *London County Council.* (1) It is therefore unnecessary here generally to discuss it. We were invited by the Crown to have regard to the subsequent legislation, such as the subsequent Local Government Acts dealing with the derating of hereditaments placed in the special list under the Act, with reference to the treatment of docks. Though the Court, in appropriate cases, is not precluded from taking into its consideration the objects for which the statutory powers have been conferred, in my view to seek such assistance as is here suggested would not be proper. No later Act purports to construe or clarify the one of 1928 ; we are therefore confined to the language of that statute, disregarding anticipatory or retrospective legislative interpretations. Except as Parliamentary expositions regarded as glossaries for the proper interpretation of the earlier Acts, subsequent Acts are not to be relied on as aids to the construction of prior Acts : *Battersby* v. *Kirk* (2) ; *Ward* v. *Folkestone Waterworks Co.*, per A. L. Smith J. (3) I pass therefore to those sections which are here directly in point.

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(1) [1931] A. C. 151.

(2) (1836) 2 Bing. N. C. 584.

(3) (1890) 62 L. T. 321, 325.

C. A.
1931

Mersey Docks and Harbour Board v. West Derby Assessment Committee and Bottomley, &c.

Slesser L.J.

By s. 5 of the Rating and Valuation (Apportionment) Act, 1928, provisions are made for the definition of what is there called a freight-transport hereditament. I propose to extract from a number of matters not here relevant or not in dispute the description essential to the determination of these cases, which is as follows: "A hereditament occupied and used wholly or partly for dock purposes"; that is to say, "all purposes connected with the shipping or unshipping at a dock of . . . . merchandise": s. 5, sub-ss. 1 (*c*) and 2 (*c*).

By the proviso to s. 6, sub-s. 3 (*b*), of the same Act it is provided among other things that in the case of such a hereditament so occupied and used for dock purposes as part of a dock undertaking, no part of the hereditament, being a building, yard, or other place primarily occupied and used for warehousing merchandise not in the course of being transported, shall be deemed to be occupied and used for transport purposes. Apart from this exclusion and other exceptions and provisions which are not here material, for the purpose of determining in what proportions a freight-transport hereditament is occupied and used for transport purposes and other purposes respectively, the hereditament shall be deemed to be occupied and used for transport purposes.

The hereditaments, in respect of which their Occupiers claim that they shall be placed in the special list as freight-transport hereditaments, are what may broadly be called warehouses. Five of them are warehouses belonging to the Mersey Docks and Harbour Board and two belong to the Liverpool Grain Storage and Transit Company. By s. 5, sub-s. 1 (*c*), in order to succeed the Occupiers must prove, among other matters, that their hereditament is part of a dock undertaking which, by definition, means an undertaking carried on by a dock authority. The expression "dock authority" includes the lessees of any dock authorized by or under any Act. There is no question here but that both proprietors of the hereditaments are dock authorities within the definition.

The two critical phrases which fall to be considered are, first, the meaning of " connected with the shipping or unshipping at a dock of merchandise " in s. 5, and secondly, the meaning of the phrase " primarily occupied and used for warehousing merchandise not in the course of being transported " in s. 6.

As regards s. 5, I think that, whatever may be the meaning of the words " connected with the . . . . unshipping at a dock of . . . . merchandise," it is clear from the proviso to s. 6, sub-s. 3, that any part of the hereditament being a building, yard, or other place primarily occupied and used for warehousing merchandise not in the course of being transported must be excluded from what might otherwise be a hereditament under s. 5, sub-s. 1 (*c*), as being used wholly or partly for dock purposes. Although the phrase " wholly or partly " in s. 5 extends in my view to an occupation or user of a part either defined by physical limitation or by commercial function, it may well be, in a particular case, that the whole hereditament in the physical sense may, as a place, primarily be occupied and used for warehousing merchandise not in the course of being transported and so nevertheless be wholly excluded from the special list under the proviso of s. 6, which is limited by its language to physical occupation within metes and bounds, notwithstanding that the hereditament might otherwise fall within the wider functional definition of s. 5 as being partly connected with the unshipping of goods.

This conclusion follows the decision of this Court in *Bailey* v. *Potteries Electric Traction Co.* (1) By s. 3, sub-s. 2 (*b*), of the Act now under consideration, it was provided that a place used for the housing or maintenance of road vehicles " shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory . . . . be deemed not to form part of the factory." This Court came to the conclusion in that case that, as the whole factory was in fact so used for housing or maintenance of road vehicles, no part of the place in question was not excluded. The House of Lords agreed in principle, and only differed from this Court on the question whether in that case in fact the work done in the whole of the hereditament was or was not maintenance of the motor vehicles. Lord Buckmaster said (1): "I think it is safe to assume that this part of the hereditament is devoted to that object and not entitled to the benefit of relief."

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(1) [1931] 1 K. B. 388.

I do not think it is necessary to repeat the facts as to the work done and charges made in the hereditaments which have been set out in the cases and their exhibits of books of rates, and in the agreed Addendum. In the case of the Wool Warehouse, I think that the facts show that it is not occupied and used wholly or partly for dock purposes; that its purposes are not connected with the unshipping at a dock of merchandise by reason of the facts stated by my Lords. Thus the hereditament does not come within s. 5 at all. It is not connected with the dock physically, and the cost of what is there done is borne by the consignee. No question, therefore, arises as to the application of s. 6.

The Stanley, Albert and Wapping Warehouses are in my opinion in a different position, and s. 6 is there material. In these cases, so far as the shipowner pays the master porter for delivery into the warehouse or the master stevedore has "delivered to King's warehouse at owner's risk but ship's expense," and in certain cases in so far as the shipowner possesses a lien and delivery can only be made to his order, I think that the purposes of the warehouses are at least partly connected, both physically and functionally, with the unshipping of goods within the meaning of s. 5; but I am nevertheless of opinion, regarding the proviso to s. 6, that no place at all forming part of the hereditament is primarily occupied and used for warehousing merchandise in the course of being transported. There is thus no room for apportionment. If the consignee wished the transport at once to proceed he would pay his duty and not store the goods in bond. The very provision of bond appears to me to be inconsistent with a continuous transport. By the Customs (Consolidation) Act, 1876, s. 284, "Queen's Warehouse" means "any place provided by the Crown, or approved by the Commissioners of Customs, for the deposit of goods for the security thereof and of the duties due thereon." The sole surviving section of the Bonded Warehouses Act, 1848 (11 & 12 Vict. c. 122), s. 26, speaks of any warehouse or place in which goods are deposited for security of the duties of customs, and contains special provisions for removing the goods.

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(1) [1931] A. C. 164.

The remaining three warehouses provide for the accommodation of grain, one belonging to the Harbour Board, and the other two to the Liverpool Grain Storage and Transit Company. These three cases were all said to be unappealable, save by permission of the Court, in that the notices of appeal were out of time. As regards the Company's cases No. 7 and 8, it was contended in reply to this preliminary objection that the appeals were entered within fourteen days from the perfecting of the judgment. Inasmuch as since 1917 the entry of judgments and appeals now takes place in the Central Office: Order XLI., r. 2; the matter should be decided according to the practice in the case of appeals not brought under the old special Crown Office practice, when judgments apparently dated from the time of sealing: see the cases mentioned on this matter by Scrutton L.J., which I do not repeat; so that under Order LVIII., r. 15, the period of time may be calculated from the time at which the judgment or order is signed, entered or otherwise perfected. These two cases were entered as to judgment on January 23, but not drawn up and sealed until February 6. Within fourteen days notice of appeal had been duly given, so that taking February 6 as the date of perfection of the judgment, on any view they were in time.

The position of the Mersey Docks grain case is different. In that case a period longer than fourteen days elapsed between the perfecting of the judgment and the entry of the appeal; and in my view the objection that the notice of appeal was not given within fourteen days is a valid one.

It was contended by the Crown that these appeals could be brought within six weeks in that they were appeals in a matter, being an action. By the Judicature Act, 1925, s. 225, an action is defined as a civil proceeding commenced by writ or any such other manner as may be prescribed by Rules of Court, and it was said that, in so far as the Secretary of State has made Rules entitled "The Rating and Valuation Act Assessment Appeal Rules, 1927," under s. 34 of the Rating and Valuation Act, 1927, with respect to the practice and procedure to be followed on and in connection with appeals under Part II. of the 1927 Act and this Act, that the hearing before Quarter Sessions was a civil proceeding commenced in a manner prescribed by Rules of Court. But in my view this contention must fail for the reason that I do not think that the proceedings did commence at the Quarter Sessions but commenced before the Assessment Committee. It is true that the Assessment Committee have no power to hear evidence on oath, but nevertheless they perform judicial functions; they are required to hear objections, and the proceedings at Quarter Sessions are, by s. 31 of the Rating and Valuation Act, 1925, said to be an appeal against the decision of the Assessment Committee. Now if this be so, the procedure before the Assessment Committee is regulated by Parts II. and III. of the Fourth Schedule of the Rating and Valuation Act, 1925. These provisions as to hearing objections and determining before finally approving the draft list are admittedly statutory and are not made by Rules of Court, and therefore if, as I think, the civil proceedings may properly be said to begin before the Assessment Committee, they are not proceedings commenced under Rules of Court and therefore the case does not fall within the six weeks provision of Order LVIII., r. 15, but the time for notice of appeal to this Court is limited to fourteen days.

In the circumstances of this case, the Court has thought fit, nevertheless, to permit the Waterloo Dock appeal to be heard; but in strict law the appellants were in mercy in this case and could only be heard by special permission of the Court.

There remains the question of the merits of the three grain warehouse appeals. In my view it is clear that these cases all fall within s. 5, that is to say, they are at least partly used for purposes connected with the unshipping at a dock of merchandise. They are also used for the shipping of merchandise. I agree with the reasons given by Scrutton L.J. for this conclusion. It may be that under s. 6, on apportionment, certain parts of the hereditament, physically definable as buildings, yards, or other places, will be shown to be primarily occupied and used for warehousing merchandise not in the course of being transported; but the facts as found show clearly that physically part of such hereditaments, such as the elevators which form a part of the hereditament, are used for unshipping grain and transporting it, and functionally the whole hereditament is partly occupied and used for such a purpose. I do not think that we should disturb the findings on these facts, nor have the agreed additions to the cases stated in any way affected my conclusion on this matter.

As all these findings are in agreement with those of the Divisional Court, I am of opinion that all these appeals should be dismissed.

Appeals dismissed.

W. H. G.

C. A.
1931
May 5, 6, 7, 8;
June 8.

ANGLO-PERSIAN OIL COMPANY, LIMITED *v.* DALE (INSPECTOR OF TAXES).

Revenue—Incom Tax—Trade Profits—Deductions—Money wholly and exclusively laid out or expended for the Purposes of the Trade—Payment to determine onerous Agency Agreement—Income or Capital Expenditure —Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D.—Rules applicable to Cases I. and II., r.* 3.

A company was incorporated with the object of raising, refining, selling and otherwise dealing with crude oil and its products in Persia and elsewhere. In 1914 the Company entered into an agreement with S. S. & Co. under which the latter were appointed agents of the Company to manage its business in Persia and the East for a term of ten years. The remuneration having proved larger and more onerous than had been anticipated by the Company, the Company determined to bring the agency to an end and thenceforth to do their own agency work in the East.

Accordingly in 1922 the Company entered into an agreement with S. S. & Co. by which it was agreed that the agency should be terminated, that S. S. & Co. should go into liquidation and wind up their business and should not start or act in or about any business connected with petroleum at M. in Persia, while in return the Company should pay S. S. & Co. 300,000*l.* The 300,000*l.* was paid and the agency was terminated. The 300,000*l.* was treated in the Company's accounts as a revenue payment, and was charged to revenue in instalments of 60,000*l.* for five years. The Company claimed that this course was correct, and justified the deduction of the 300,000*l.* from its annual expenses in seeking the profits and gains. The inspector of taxes disputed this course, and claimed that the 300,000*l.* ought to be treated as an expenditure on capital account, an expenditure which brought to an end an onerous contract and secured to the Company a freedom from charges which would have continued for some years. The Commissioners accepted the latter argument, and held that the sum of 300,000*l.* was not an admissible deduction in computing the profits and gains of the Company for the year ending March 31, 1923, and adjusted the figures of assessments for the years ending April 5, 1923, 1924, 1925 and 1926, accordingly.

Rowlatt J. held that the sum was an admissible deduction.

On appeal:—

Held, applying the test laid down by Lord Cave L.C. in *British Insulated and Helsby Cables* v. *Atherton* [1926] A. C. 205, 213, that the payment in question did not bring any asset into existence and could not properly be said to have brought into existence an advantage for the benefit of the Company's trade within the meaning of that expression as used by Lord Cave.

Held, therefore, that the payment was a revenue payment and was deductible by the company in ascertaining its net profits.

Test of whether the money was provided from fixed or circulating capital adopted in *Hancock* v. *General Reversionary and Investment Co.* [1919] 1 K. B. 25; *Mitchell* v. *B. W. Noble, Ld.* [1927] 1 K. B. 719; and *Mallett* v. *Staveley Coal & Iron Co.* [1928] 2 K. B. 405 applied.

Decision of Rowlatt J. affirmed.

APPEAL from a decision of Rowlatt J. on a Case stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the Commissioners held on April 9, 1930, the Anglo-Persian Oil Company, Ld. (hereinafter called "the Company"), appealed against the following assessments to income tax which had been made under Sch. D of the Income Tax Act, 1918, namely:—

(A) An assessment in the sum of 1,000,000*l.* for the year ending April 5, 1923.

(B) An additional assessment in the sum of 737,712*l.* for the year ending April 5, 1923.

(C) An assessment in the sum of 1,500,000*l.* for the year ending April 5, 1924.

(D) An assessment in the sum of 1,500,000*l.* for the year ending April 5, 1925.

(E) An assessment in the sum of 1,500,000*l.* for the year ending April 5, 1926.

(F) An additional assessment in the sum of 646,908*l.* for the year ending April 5, 1926.

(G) An additional assessment in the sum of 454,384*l.* for the year ending April 5, 1926.

The assessments under appeal were made under Case I. of Sch. D of the Income Tax Act, 1918, and were in respect of the profits arising to the Company from the producing, refining and selling of oil, etc.

The Company was incorporated in the year 1909 with the object of raising, refining, selling and otherwise dealing with crude oil and its products in Persia and elsewhere. In accordance with the practice usual with companies with large interests overseas, the Company at its inception appointed agents to conduct its business in remote parts of the world.

But as business developed, the Company from time to time dispensed with the services of such agents, finding itself able to carry on the business more economically directly by its own servants.

By an agreement dated March 21, 1910, and made between the Company of the one part and Lloyd, Scott & Co., Ld., of the other part the Company appointed Lloyd, Scott & Co., Ld., as their managing agents to manage their business in Persia and the East and to effect and carry out the sale of oil, petroleum and other products of the Company and generally to act as their agents in Persia and the East upon the terms therein mentioned, such terms to be subject to alteration according to mutual agreement.

By an agreement dated May 6, 1914, and made between the Company of the one part and Strick, Scott & Co., Ld., formerly Lloyd, Scott & Co., Ld. (thereinafter called "the agents"), of the other part it was agreed (inter alia) that :—

(1.) The said agreement dated March 21, 1910, should be deemed to have been cancelled as on March 31, 1913.

(2.) The Company should appoint and engage the agents as their managing agents to manage their business in Persia and the East and to effect and carry out the sale of petroleum and other products of the Company and generally to act as their agents in Persia and the East, and should during the continuance of the said agreement pay to the agents by way of remuneration for their services the respective rates of commission therein mentioned, being those specified in paras (A), (B), (C) and (D) of clause 5.

(3.) In addition to the commission payable by the Company to the agents as aforesaid the Company agreed by para. (E) of clause 5 to pay to the agents the out of pocket expenses incurred by them in travelling on the business of the Company and the administration expenses of the said agency.

(4.) The agents should keep in proper books full records of the Company's business passing through their hands or the hands of the sub-agents, and the said records and all documents relating to the premises in the possession or under the control of the agents should belong to the Company.

(5.) All moneys belonging to the Company received by the agents should be paid into a separate banking account at a bank to be approved by the Company.

(6.) The agents should at all times during the continuance of the said agreement observe the directions and instructions of the Company.

(7.) The said agreement of May 6, 1914, should subsist for a term of ten years from January 1, 1914, and on the expiration of such period of ten years the employment of the agents was to be continued for a further period of ten years under the conditions of the said agreement, but upon such terms of remuneration as should be arranged or failing arrangement as should be fixed by arbitration.

The Company had not at any time held shares in Strick, Scott & Co., Ld. Some of the directors of the Company were also directors of Strick, Scott & Co., Ld.

As time went on the commission payable to Strick, Scott & Co., Ld., under the said agreement of May 6, 1914, became very large and much in excess of the amount anticipated.

In June, 1919, Strick, Scott & Co., Ld., decided that they would not for the time being ask the Company to pay the administration of the said agency under para. (E) of clause 5 of the said agreement of May 6, 1914, and they communicated this decision to the Company by a letter dated June 16, 1919. An analysis expressed partly in sterling, partly in rupees, and partly in Persian crans of the amounts payable to Strick, Scott & Co. under the said agreement for the years ending March, 1919, 1920 and 1921, was contained in the statements which were attached to and formed part of the Case. In round figures the aggregate remuneration for the said three years was as follows: 1918–19 70,000*l.*; 1919–20 90,000*l.*; and 1920–21, 130,000*l.*

At a meeting of the directors of the Company held on January 31, 1921, the chairman pointed out that as the commissions being earned by Strick, Scott & Co., Ld., were much in excess of the amount anticipated at the time the said agreement of May 6, 1914, was entered into, he thought they might be induced to modify the terms for the balance of their present agreement subject to a settlement of the terms for the renewal period. It was thereupon resolved at the said meeting to appoint a committee to discuss the matter with a committee of Strick, Scott & Co., Ld., and to submit their recommendations to the Board.

Negotiations then ensued for the cancellation of the said agreement of May 6, 1914, and by October 31, 1922, terms for cancellation had been agreed upon between the Company and Strick, Scott & Co., Ld.

The terms of cancellation were embodied in an agreement dated November 17, 1922, and made between the Company of the one part and Strick, Scott & Co., Ld., of the other part and expressed to be supplemental to the said agreement of May 6, 1914 (thereinafter referred to as "the principal agreement").

By the agreement of November 17, 1922, it was agreed (inter alia) that :—

(i.) The principal agreement and the appointment thereby made should cease and determine as from December 31, 1922.

(ii.) Strick, Scott & Co., Ld., should take steps to go into voluntary liquidation on or before December 31, 1922, and to wind up their business, and should not be parties to any scheme for the reconstruction of the business of Strick, Scott & Co., Ld., by the formation of any other company having as part of its objects the carrying on at Mohammerah in Persia of any business connected with petroleum or any of its products.

(iii.) As part of the consideration for such cancellation the Company should pay in cash to Strick, Scott & Co., Ld., on December 31, 1922, or so soon thereafter as Strick, Scott & Co., Ld., should have passed an effective resolution for winding up to the liquidator thereof 300,000*l.*

(iv.) As a further part of such consideration the Company agreed to employ on the terms of their existing agreements and for the balance of the periods covered by such agreements such of the employees of Strick, Scott & Co., Ld., as were on December 31, 1922, employed exclusively for the purposes of the agency thereby agreed to be terminated and as were willing to be transferred into the service of the Company.

(v.) Upon payment of the said sum of 300,000*l.* Strick, Scott & Co., Ld., or their liquidator should purchase at par and pay for in cash 5 per cent. first mortgage debenture stock of the Company to a nominal amount of 198,700*l.* ex interest due on December 31, 1922.

By a further agreement also dated November 17, 1922, and made between Strick, Scott & Co., Ld., of the one part and the Company of the other part, the Company acquired from Strick, Scott & Co., Ld., their land at Mohammerah together with the buildings thereon and their furniture, fittings, machinery, plant and launches for 100,000*l.*, and in addition a sum equal to the total amount of capital expenditure made by Strick, Scott & Co., Ld., in respect of the said premises at Mohammerah between April 1 and December 31, 1922. This price was arrived at on the basis of a sale between a willing purchaser and a willing seller and independently of the said sum paid for cancellation of the agreement of May 6, 1914. The business of Strick, Scott & Co., Ld., in Persia continued to be carried on by a company called Frank C. Strick (Basra), Ld., in Basra and Baghdad.

The two agreements of November 17, 1922, were duly carried into effect, and Strick, Scott & Co., Ld., ceased to act as agents for the Company as from December 31, 1922, and went into liquidation. The Company took over the property and employees of the agency and paid the two sums of 300,000*l.* and 100,000*l.* to the liquidator of Strick, Scott & Co., Ld., who purchased the 198,700*l.* debentures at par. The said sum of 300,000*l.* was paid in cash in the year ending March 31, 1923. The said sum was treated in the Company's accounts as a revenue payment and was charged to revenue at the rate of 60,000*l.* a year for five years.

Lord Inchcape, who was a director of the Company appointed by the Government in the year 1922, was called as a witness before the Commissioners and they accepted his evidence. He stated that—

(A) The cancellation of the agency agreement of

May 6, 1914, was done entirely in the interests of the Company.

(B) Before consenting to the said cancellation, he consulted with His Majesty's Treasury, as the British Government held about 44 per cent. of the shares of the Company.

(C) The cancellation of the said agreement had been fully justified by results, and a considerable economy and saving in working expenses had resulted to the Company therefrom.

It was contended on behalf of the Company that :—

(A) The said sum of 300,000*l.* was money wholly and exclusively laid out or expended for the purposes of the Company's trade.

(B) The said sum was an admissible deduction in computing the Company's profits for the year ending March 31, 1923.

(C) The case was analogous to and governed in principle by *Mitchell* v. *B. W. Noble, Ld.* (1)

It was contended on behalf of the respondent (inter alia) that the said sum of 300,000*l.* was capital expenditure and therefore not an admissible deduction in computing the profits of the Company.

The Commissioners, having considered the evidence and arguments adduced before them, found that the said sum of 300,000*l.* was an expenditure of a capital nature to secure an enduring benefit for the Company's trade by getting rid of an onerous contract, and was not an admissible deduction in computing the Company's profits for the year ending March 31, 1923, and they adjusted the figures of the assessments under appeal to amounts which were agreed upon between the parties.

Rowlatt J. disagreed with the finding of the Commissioners and held that the 300,000*l.* was an admissible deduction in computing the Company's profits for the year ending March 31, 1923.

The Crown appealed. The appeal was heard on May 5, 6, 7 and 8, 1931.

Sir William Jowitt A.-G. and *R. P. Hills* for the appellant. The agreement of November 17, 1922, was that Strick, Scott &

(1) [1927] 1 K. B. 719.

Co., Ld., sold to the respondents a valuable part of their business, and the payment made to them was a capital sum paid for a capital asset, as in *Countess Warwick Steamship Co.* v. *Ogg* (1): see also *Rowntree & Co.* v. *Curtis* (2), where *Hancock* v. *General Reversionary and Investment Co.* (3) is distinguished, and *Atherton* v. *British Insulated and Helsby Cables, Ld.* (4), where both these cases were discussed. In the *Atherton* case (5) in the House of Lords Lord Cave L.C. stated the question was whether the sum expended was "a proper debit item to be charged against incomings of the trade when computing the profits of it"; and that this depended on whether the expenditure in question was made "with a view of bringing into existence an asset or an advantage for the enduring benefit of a trade." Here the respondents made the payment to Strick, Scott & Co., Ld., for the enduring benefit of their trade, for they took over the agency business previously done by Strick, Scott & Co., Ld. It might have been different if the payment had been made to get rid of one agent and employ another, and *Mitchell* v. *B. W. Noble, Ld.* (6), might then have had some application. In that case a payment was made in instalments by a company to a director on his agreeing to retire. Rowlatt J. (7) pointed out that the payment was not made to obtain an enduring advantage, for the director's continuation with the company, though he was an unsatisfactory servant, was not a permanency.

[ROMER L.J. Since the *Atherton* case (8) was decided, the test to be applied in such cases as the present seems to be well settled; and the question in each case is whether applying the test there laid down the payment in question is on the facts a capital or income payment.]

That is so: compare *Mallett* v. *Staveley Coal & Iron Co.* (9) The question is one of degree and therefore of fact, and the Commissioners have found that the expenditure here was made for the acquisition of a capital asset. That is a plain finding of fact from which there is no appeal. In *Hancock's* case (1) the payment was ascertained on an actuarial calculation, and in *Rowntree & Co.* v. *Curtis* (2) it was distinguished on that ground.

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(1) [1924] 2 K. B. 292.
(2) [1925] 1 K. B. 328.
(3) [1919] 1 K. B. 25.
(4) [1925] 1 K. B. 421; [1926] A. C. 205.
(5) [1926] A. C. 205, 213.
(6) [1927] 1 K. B. 719.
(7) (1926) 11 Tax Cas. 372, 415.
(8) [1926] A. C. 205.
(9) [1928] 2 K. B. 405, 413, 416.

[They also referred to *Royal Insurance Co.* v. *Watson* (3); *Southwell* v. *Savill Brothers, Ld.* (4); *Granite Supply Association* v. *Kitton* (5); *Vallambrosa Rubber Co.* v. *Farmer* (6); *Moore & Co.* v. *Hare* (7); *Ounsworth* v. *Vickers, Ld.* (8); *John Smith & Son* v. *Moore.* (9)]

Latter K.C. and *Cyril King* for the respondents. The respondents are entitled to deduct the payment in question as an income payment under r. 3 of the Rules applicable to Cases I. and II. That point is covered by *Hancock's* case (1) (which was approved but distinguished by the House of Lords in *Atherton's* case (10)) and *Mitchell* v. *B. W. Noble, Ld.* (11), which show that it is an income payment. It has been contended, however, that the Commissioners' findings are conclusive. They have found that "the sum of 300,000*l.* was an expenditure of a capital nature to secure an enduring benefit for the Company's trade by getting rid of an onerous contract." That is not sufficient, however, for they have left undecided what the object of the contract was, and this is most material. The Company does not deal in contracts of agency, and the employment of an agent is merely an expense of running its business. A payment to an agent to get rid of him must also be an expense of running the business, for the employment of an agent is never in the region of capital expenditure. That was ground of the decision in *Mitchell* v. *B. W. Noble, Ld.* (11) It was not open to the Commissioners on the facts of this case to say that the expenditure by the respondents was not made out of circulating capital, because the expenditure was in regard to a matter incidental to the carrying on of the business: *Mallett* v. *Staveley Coal & Iron Co.* (1)

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(1) [1919] 1 K. B. 25.
(2) [1925] 1 K. B. 328.
(3) [1897] A. C. 1.
(4) [1901] 2 K. B. 349.
(5) (1905) 5 Tax Cas. 168, 171.
(6) (1910) 5 Tax Cas. 529, 536.
(7) (1914) 6 Tax Cas. 572.
(8) [1915] 3 K. B. 267.
(9) [1921] 2 A. C. 13.
(10) [1926] A. C. 205.
(11) [1927] 1 K. B. 719.

Further, the question whether a payment is a capital or revenue expenditure is a question of law and not fact. The Commissioners failed here to answer the question whether the contract put an end to related to capital or income account; but if they had decided that it related to capital they would have been wrong in law, so that the decision could be reversed: *Royal Insurance Co.* v. *Watson* (2); *Southwell* v. *Savill Brothers, Ld.* (3); *Vallambrosa Rubber Co., Ld.* v. *Farmer* (4); *Ounsworth* v. *Vickers, Ld.* (5) The statement to the contrary by Lord Cave L.C. in *Atherton's* case (6) cannot prevail against this long line of authorities. It is said that it makes a difference that the respondents are now carrying on themselves the business previously done by their agents; but a principal does not acquire his agent's business when he puts an end to the agency. It has been his business all along. The "enduring benefit" mentioned by Lord Cave L.C. in *Atherton's* case (6) means a benefit which is an enduring asset for capital account.

R. P. Hills replied.

Cur. adv. vult.

June 8. The following written judgments were delivered:—

LORD HANWORTH M.R. This appeal is from an order of Rowlatt J. dated March 4, 1931, whereby he reversed the decision of the Commissioners for the Special Purposes of the Income Tax Acts, and held that the sum of 300,000*l.* which is in question was an admissible deduction in computing the Company's profits for the year ending March 31, 1923.

The facts out of which the point to be decided arises are as follows: The Anglo-Persian Oil Company, Ld., the respondents to this appeal, are a company incorporated in the year 1909 with the object of raising, refining, selling, and otherwise dealing with crude oil and its products in Persia and elsewhere. By an agreement dated May 6, 1914, made between the

(1) [1928] 2 K. B. 405, 413.
(2) [1897] A. C. 1.
(3) [1901] 2 K. B. 349.
(4) 1910 S. C. 519; 5 Tax Cas. 529.
(5) [1915] 3 K. B. 267.
(6) [1926] A. C. 205, 213.

respondents and Strick, Scott & Co., Ld., the latter company were made the agents of the respondents to manage their business in Persia and the East, and to carry out the sale of petroleum and other products of the Company, and generally to act as the agents of the respondents during the continuance of the term stated in the agreement. Certain commissions were made by the agreement payable to the agents, and fuller details of the agreement are stated in the Case. The agreement was to continue for ten years from January 1, 1914, and on the completion of that term, for a further term of ten years on the same conditions, but upon such terms of remuneration as should be arranged, or, failing arrangement, as should be fixed by arbitration. The remuneration payable under the agreement of May, 1914, to the agents proved to be larger and more onerous than had been anticipated by the respondents. It amounted to 90,000*l.* in the year 1919–20, and to 130,000*l.* in 1920–21.

In September, 1922, a committee of the Board of directors of the respondents reported in favour of bringing the agency of Strick, Scott & Co., Ld., to an end. They stated that if this course were adopted : " The Anglo-Persian Oil Company would have greater freedom of action with regard to the conduct of its business in the East. It would have more effective control by being in direct touch with the employees and customers, and would be entirely dissociated from any other operations commercial or political." Accordingly, negotiations to bring the agency to an end, which had been entered upon, were continued ; and ultimately terms were agreed and embodied in an agreement dated November 17, 1922, whereby it was agreed that the agreements of May 6, 1914, and the appointment of Strick, Scott & Co., Ld., as agents thereby made, should cease, and determine, as from December 31, 1922. Strick, Scott & Co., were to go into liquidation, and to wind up their business, and, in short, were not to start, or act in, or about, any business connected with petroleum at Mohammerah in Persia, while in return, the respondents were to pay to Strick, Scott & Co., 300,000*l.*

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Among other terms it may be stated that the respondents agreed to take into their employ for the balance of the period for which the agency had to run any of the employees of Strick, Scott & Co., on December 31, 1922, who were willing to be transferred to the service of the respondents.

Another, and separate, agreement was also entered into between the parties, under which for the sum of 100,000*l.* the respondents acquired from Strick, Scott & Co., their land at Mohammerah, with the buildings thereon, and the contents therein, together with plant, machinery, launches, etc. This agreement, and the sum paid under it, was separate from the agreement which brought the agency to an end.

The agreements were carried out; the 300,000*l.* was paid; the agency was terminated; and thereafter the respondents have acted as distributors of their oil and products themselves, and have not appointed any other agents. The cancellation of the agreement is stated in the Case to have resulted in a considerable economy, and saving in working expenses to the respondents.

The sum of 300,000*l.* was treated in the respondents' accounts as a revenue payment, and was charged to revenue in instalments of 60,000*l.* for five years, and they claim that this course was correct, and justifies the deduction of the 300,000*l.* from their annual expenses in seeking profits and gains.

The appellant disputes this course, and claims that the 300,000*l.* ought to be treated as an expenditure on capital account, an expenditure which brought to an end an onerous contract, and secured to the respondents a freedom from charges which would have continued for some years.

The Commissioners accepted this latter argument, and ordered the debits relating to the 300,000*l.* to be eliminated from the profit and loss accounts of the respondents. Rowlatt J. has held that the sum in question was an admissible deduction.

The deductions that are permitted to a trader are not affirmatively stated in the Income Tax Act, 1918. They are to be ascertained by an examination of the deductions which are not allowed by r. 3 of the Rules applicable to Cases I. and II. of Sch. D.

It has been said by Lord Sumner in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1) that the effect of this structure is that the direction to compute the full amount of the balance of the profits must be read as subject to certain allowances, and to certain prohibitions of deductions, but that a deduction, if there be such, which is neither within the terms of the prohibition, nor such that the expressed allowance must be taken as the exclusive definition of its area, is to be made, or not to be made, according as it is, or is not, on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of profits of it.

It was argued that the finding of the Commissioners in the present case ought to be accepted as one of fact within their own sphere, and so not the subject of appeal as a question of law. This argument is not, to my mind, well founded. The cases upon this point of what is attributable to revenue, and what to capital account, run upon fine lines of distinction, and the Commissioners have to direct themselves correctly upon the questions of law that are involved. The deductions that are permissible must be examined from the point of view of law. They cannot be said to be simply questions of fact irrespective of the principles of law. It is, therefore, necessary to consider the principles upon which items have been held to belong to capital, or revenue, and the characteristics which have been held to turn a particular item into the one category or the other.

Certain illustrations can be given of items that have been held to fall on one side of the line or the other. Thus in *Southwell* v. *Savill Brothers, Ld.* (2), it was held that the cost of calling in and surrender of some licences so as to get new licences is not a revenue expense, but capital expenditure on extending the business. In *Moore & Co.* v. *Hare* (3) the expense of promoting Bills in Parliament whereby further

(1) [1915] A. C. 433, 468.

(2) [1901] 2 K. B. 349.

(3) 6 Tax Cas. 572.

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facilities were obtained from an existing railway, was held to be a capital outlay. In *Ounsworth* v. *Vickers, Ld.* (1), the outlay on making a new channel for a large vessel to find its way from the stocks, where it was being built, into the Walney Channel, and so to a harbour, was held to be a capital outlay, and not an expenditure chargeable to income. In *John Smith & Son* v. *Moore* (2) the purchase of some unexecuted coal contracts under which coal would be supplied, was held to be capital expenditure. In *Countess Warwick Steamship Co.* v. *Ogg* (3) the cancellation of a contract to supply a ship which was to be used as one of the fleet in the business carried on, was held to be a capital expenditure. So, too, in *Rowntree & Co.* v. *Curtis* (4) a lump sum paid to an employees' benefit fund was held to be a capital expense. And in *British Insulated and Helsby Cables* v. *Atherton* (5) the contribution, actuarily ascertained as a nucleus to the pension fund of its salaried staff, was held not to be an admissible deduction, but followed the decision in *Rowntree & Co.* v. *Curtis* (4), and was held to be expenditure to secure an advantage, or an enduring benefit: see per Lord Cave. (6) On this principle, in *Mallett* v. *Staveley Coal & Iron Co.* (7) the purchase and surrender of leases by which the terms on which the mines were being worked were varied, was held to be on capital account. The Company freed themselves from a capital liability. In this case the test suggested was whether or not the money provided was from the fixed or the circulating capital. (8)

In *Mitchell* v. *B. W. Noble, Ld.* (9), a test is suggested that if the expenditure is not to secure an asset, but to enable the business to continue its same course as before, and only to remove a difficulty in carrying the business on on the same lines as before, then the expenditure is from revenue, and not from capital.

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(1) [1915] 3 K. B. 267.
(2) [1921] 2 A. C. 13.
(3) [1924] 2 K. B. 292.
(4) [1925] 1 K. B. 328.
(5) [1926] A. C. 205.
(6) Ibid. 213.
(7) [1928] 2 K. B. 405.
(8) Ibid. 413, 417.
(9) [1927] 1 K. B. 719, 737.

In *Hancock* v. *General Reversionary and Investment Co.* (1) the cost of buying up or putting a lump sum down in lieu of an annual pension, was held to be an admissible expenditure on revenue account, because it merely anticipated payments which were, or would have been in each year, attributable to revenue. And so too in *Mitchell* v. *B. W. Noble, Ld.* (2), the payments to get rid of a director in order to facilitate the general carrying on of the business was also held attributable to revenue. It is not easy to define the principle which is to be deduced from the characteristics of these cases. I am inclined to think that the question whether the money paid is provided from the fixed or the circulating capital comes as near to accuracy as can be suggested.

Lord Cave's test that where money is spent for an enduring benefit it is capital, seems to leave open doubts as to what is meant by "enduring." In *Mitchell* v. *B. W. Noble, Ld.* (2), the dismissal of the director once and for all might have connoted an enduring benefit, but the expenditure was held not to be a capital expense.

The Attorney-General pressed upon the Court that where you bring into existence an asset for the Company, the expenditure is from capital; and he claimed that the taking of the agency back into the hands of the Company, together with the engagement of the employees of Strick, Scott & Co. if they were willing to be employed, was the creation, or taking over, of a valuable asset.

This does not appear to be a true reading of what took place. The Company had appointed Messrs. Strick, Scott & Co. as their agents. They have now withdrawn that agency, and are doing the business themselves. It seems difficult to accept the view that the appointment of an agent, or the withdrawal of an agency, in the very business belonging to the principals creates or destroys a business of a separate nature or an asset which is to be added to the capital account.

It seems rather that the cases of *Hancock* (1), and of *Mitchell* v. *B. W. Noble, Ld.* (2), and of *Mallett* v. *Staveley Coal & Iron Co.* (3) give illustrations that the test of fixed

(1) [1919] 1 K. B. 25.

(2) [1927] 1 K. B. 719.

(3) [1928] 2 K. B. 405.

or circulating capital is the true one; and where, as in this case, the expenditure is to bring back into the hands of the Company a necessary ingredient of their existing business—important, but still ancillary and necessary to the business which they carry on—the expenditure ought to be debited to the circulating capital rather than to the fixed capital, which is employed in and sunk in the permanent—even if wasting—assets of the business.

Upon this survey of the cases I have come to the conclusion that the Commissioners have not asked themselves the right question, and have not directed themselves aright on this difficult point of law. The consequent result is that I think it is open for the Court to express its opinion in law.

Then, as Rowlatt J. points out, there is no evidence of the purchase of the goodwill of some business, nor is there any trace of a payment to start a business. The payment is to put an end to an expensive method of carrying on the business which remains the same whether the distributive side is in the hands of the respondents themselves, or of their agents.

For the reasons that I have given, I agree with the judgment of Rowlatt J.

The appeal must be dismissed with costs.

LAWRENCE L.J. In my judgment the decision of Rowlatt J. in this case was plainly right.

It is common ground that the sum of 300,000*l.* in question was a disbursement wholly and exclusively expended for the purposes of the Company's trade, and the only question is whether it was an admissible deduction in computing the Company's profits for the relevant accounting period.

I cannot help thinking that but for the magnitude of the amount involved it would not have occurred to the Commissioners to challenge the propriety of treating the disbursements in question as a charge to revenue.

It is not open to doubt that under ordinary circumstances where a trader in order to effect a saving in his working expenses dispenses with the services of a particular agent or servant, and makes a payment for the cancellation of the agency or service agreement, such a payment is properly chargeable to revenue ; it does not involve any addition to or withdrawal from fixed capital ; it is purely a working expense. The fact that the payment includes a sum in consideration of the agent or servant agreeing not to compete with his principal or employer after the determination of his employment (a stipulation frequently met with in these cases) does not alter the character of the payment.

In the present case the sum paid to the agent for the cancellation of his agreement, and the winding up of his concern, was very large ; but it has to be remembered that the annual profits of the Company were enormous. Thus, in the year in which the payment was made the profits amounted to just under 3,000,000*l.*, and the 300,000*l.* in question was charged to revenue at the rate of 60,000*l.* a year for five years. Moreover, according to the evidence, a considerable economy and saving in working expenses resulted to the Company from the cancellation of the agency agreement, and therefore it is not unreasonable to suppose that the increased revenue of the Company will more than cover the expenditure in question. But whether that be so or not does not affect the principle that such a payment is an income expenditure. Even if the Company had been mistaken in its policy, and by getting rid of its agent had increased the working expenses instead of diminishing them, the payment would still have been a mere working expense, and, as such, chargeable to revenue.

The main argument addressed to us by the Attorney-General and Mr. Hills, on behalf of the Crown, was that the Company, by getting rid of its agent in Persia, was enlarging the area of its operations, was improving its goodwill, and was in fact embarking upon a new enterprise. Indeed, the argument was pressed so far as to suggest that the payment was really made by way of purchase money for the goodwill which the agent has built up in Persia during his agency.

The fallacy underlying the whole of this argument, in my judgment, consists in treating the agent as if he were an independent trader, and not the agent of the Company carrying on the Company's trade. It is plain that the agent was throughout acting on behalf of his principal, and the area of his operations was the area of the Company's operations, and the goodwill built up by him was the Company's goodwill. It follows that the Company by cancelling the agency agreement, and itself undertaking the future management of its business in Persia, neither enlarged the area of its operations, nor improved its goodwill, nor embarked upon a new enterprise; it merely effected a change in its business methods and internal organization, leaving its fixed capital untouched.

We have been referred to a number of cases in which the question whether a particular payment was a capital payment or an income payment has been debated. In none of these cases, however, were the facts the same as in the present case. Of all the cases cited, *Mitchell* v. *B. W. Noble, Ld.* (1), most closely resembles the present case. In that case a large sum (9000*l.*) was paid by a company to one of its managing directors in order to get rid of him, and it was held by this Court that the payment was properly chargeable to revenue. The Master of the Rolls, in the course of his judgment, said (2): "It was a payment made in the course of business, with reference to a particular difficulty which arose in the course of the year, and was made not in order to secure an actual asset to the company but to enable the company to continue to carry on, as it had done in the past, the same type and high quality of business." And Sargant L.J. said (3): "It is quite impossible to put against the capital account of the company, as I conceive it, a payment of this nature. It seems to me that the payment, though large and though exceptional, was not of such a nature; it certainly was not capital withdrawn from the company, or any sum employed or intended to be employed as capital in the business. . . . To my mind, it is essentially different from those various payments in the cases which have been referred to, which were of the nature of adding to or improving the equipment, or otherwise made for the permanent benefit of the company." These remarks appear to me to apply a fortiori to the present case. The 300,000*l.* in question was not paid out of capital, therefore no capital of the Company has been withdrawn, nor was the 300,000*l.* employed, or intended to be employed, in the business by way of addition to, or improvement of, the capital of the Company.

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(1) [1927] 1 K. B. 719.

(2) [1927] 1 K. B. 737.

(3) [1927] 1 K. B. 740.

Except in so far as any general principle can be extracted from the other cases cited to us, they are not of much assistance in deciding the present case. The broad principle applicable to a case like the present is stated by Viscount Cave L.C. in *British Insulated and Helsby Cables* v. *Atherton* (1) as follows: "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital." Applying that test to the present case, the payment in question did not bring any asset into existence, nor can it, in my opinion, properly be said that it brought into existence an advantage for the enduring benefit of the Company's trade within the meaning of that expression in the passage which I have quoted. What the House of Lords was considering in that case was a sum irrevocably set aside as a nucleus of a pension fund established by a trust deed for the benefit of the company's clerical and technical salaried staff, and I have no doubt that Lord Cave had that fact in mind when he spoke of an advantage for the enduring benefit of the company's trade. Such an expenditure differs fundamentally from the expenditure with which we are concerned in the present case. There the expenditure brought into existence a permanent fund which would enure for the benefit of the company's staff during the existence of the company, however much the personnel of that staff might change, whereas in the present case the expenditure brought no such permanent advantage into existence, as the Company

(1) [1926] A. C. 205, 213.

might, at any time, revert to its former method of conducting its business, and place the management of its business in Persia again in the hands of an agent. The change in the method of carrying on the Company's business in Persia has, in fact, resulted in a more economical and efficient working of the Company's trade, and in that sense has proved to be advantageous to the Company's business; but it cannot be said that the expenditure in bringing about such a change has created an advantage for the enduring benefit of the Company's trade.

The Special Commissioners apparently founded their decision on *Mallett* v. *Staveley Coal & Iron Co.* (1) In that case a sum had been paid for the surrender of certain seams of coal which were held by a mining company under leases containing onerous terms, and the Court held that the sum so paid was a capital expenditure relating to the fixed, and not to the circulating capital of the company, as the company was not a company formed to deal in mining leases, but a company formed to deal in coal won under its mining leases. The mining leases, therefore, constituted part of the fixed capital of the company.

The Special Commissioners seem to have thought that as the payment made in the present case was for the purpose of getting rid of an onerous contract it came within the principle of *Mallett's* case. (1) In my opinion they seem to have misunderstood the ratio decidendi of that case which, in my judgment, has no application to a contract of agency such as we are concerned with here. Although it is true to say that the Company is not formed for the purpose of dealing in contracts of agency, that fact did not make the agency contract which was cancelled in the present case a part of the fixed capital of the Company. The Company's oil concessions in Persia are part of the Company's fixed capital, and if a sum were paid for the cancellation of such a concession on the ground that it was onerous that would, no doubt, be a capital expenditure within the principle of the decision in *Mallett's* case. (1) The Company's contracts for

(1) [1928] 2 K. B. 405.

the delivery of oil forms part of its circulating capital, and if a sum were paid for the cancellation of such a contract it would no doubt be a payment in respect of its circulating capital, and properly attributable to revenue. The contract to employ an agent to manage the Company's business in Persia, however, in no sense forms part of the fixed capital of the Company, but is a contract relating entirely to the working of the Company's business, the method of managing which may be changed from time to time. Neither the contract itself nor a payment to cancel it would, in my opinion, find any place in the capital accounts of the Company.

For these reasons I agree that the appeal fails, and should be dismissed.

ROMER L.J. It is unnecessary for me to recapitulate the facts of this case that resulted in the payment by the respondent Company of 300,000*l.* to the liquidator of Strick, Scott & Co., Ld., and I can turn at once to a consideration of the question whether that sum was or was not an admissible deduction in computing the respondent Company's profits for the year ending March 31, 1923.

Towards the solution of this problem little, if any, assistance is afforded by the Income Tax Act. It is, indeed, provided by s. 209 that in arriving at the amount of profits or gains for the purpose of income tax, no other deductions are to be made than such as are expressly enumerated in the Act. But, as has often been pointed out, the Act nowhere enumerates the deductions that may be made. It merely prohibits the making of certain specified deductions. Nor is it to be taken that any deduction may legitimately be made that is not expressly prohibited by r. 3 to Cases I. and II. under Sch. D, or that deductions are to be limited to those expressly excepted from the prohibitions in that rule. The reason for this is to be found in the fact that under Case I. the income tax is to be computed upon the full amount of the balance of the profits or gains, and this connotes that all debit items that ought, in accordance with the ordinary principles of accountancy, to be charged against incomings of the trade when computing the balance of its profits and none others, will be so charged: see *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (1) But why, this being so, the Legislature should have taken the trouble to prohibit all the deductions specified in r. 3, many of which are such as no one would dream of deducting from the incomings of the trade for the purpose of computing the balance of profits will, for me at any rate, ever remain a mystery.

So far as the Act itself is concerned, one is, therefore, left without guidance as to the deductions that are permissible, but with the mind somewhat unsettled by reason of the list of prohibited deductions as to what, in the view of the Legislature, is to be considered for the purposes of income tax the balance of the profits or gains.

In these circumstances, it is not surprising that the cases in which the Court has been called upon to say whether some particular deduction is or is not permissible should have been numerous and not always easy to reconcile with others in which the facts were not dissimilar. Nor is it surprising that learned judges should have applied tests which, however satisfactory for the purpose of solving the particular problem before them, should turn out to be inconclusive or insufficient when applied to the facts of another case.

At the end of the year 1925, however, all these authorities were considered by the House of Lords in *British Insulated and Helsby Cables* v. *Atherton* (2), and the law applicable to such cases as the present was, as it seems to me, placed beyond the realms of controversy. The boundary line between deductions that were permissible and those that were not had previously been uncertain and difficult to follow. As regards the large majority of deductions, there was and could be no conceivable doubt. They were clearly on one side of the line or the other. But as regards a comparatively small number, it was difficult to say on which side of the line they fell. This was particularly the case where, as in the present one, an expenditure is not a recurring one, but is made once and for all. It was pointed out by Lord Cave in *Atherton's* case (3)

(1) [1915] A. C. 433, 468.
(2) [1926] A. C. 205.
(3) [1926] A. C. 205, 213.

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that an expenditure, though made once and for all, may nevertheless be treated as a revenue expenditure, and he then added this: "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital." It should be remembered, in connection with this passage, that the expenditure is to be attributed to capital if it be made "with a view" to bringing an asset or advantage into existence. It is not necessary that it should have that result. It is also to be observed that the asset or advantage is to be for the "enduring" benefit of the trade. I agree with Rowlatt J. that by "enduring" is meant "enduring in the way that fixed capital endures." An expenditure on acquiring floating capital is not made with a view to acquiring an enduring asset. It is made with a view to acquiring an asset that may be turned over in the course of trade at a comparatively early date. Nor, of course, need the advantage be of a positive character. The advantage may consist in the getting rid of an item of fixed capital that is of an onerous character, as was pointed out by this Court in *Mallett* v. *Staveley Coal & Iron Co.* (1)

Now this being the test to be applied in such cases as the present, it is obvious that the question whether an expenditure made once and for all is or is not to be treated as chargeable to capital and not revenue is one of fact only. Being a question that the Commissioners are eminently qualified to answer, it is to be hoped that in future they will answer it by reference to the language of the test laid down by Lord Cave, and not as though they are deciding a question of law. Too often in the past the Commissioners have found that a particular sum is or is not a permissible deduction. That is a question of law, or at any rate mixed law and fact. If they will find that the expenditure in question was or was not made, as the case may be, with a view to bringing into existence some asset or advantage for the enduring benefit of the trade, their finding will be one of fact, and if there be some evidence upon which the finding can reasonably be made, it will not be subject to review in the Courts.

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(1) [1928] 2 K. B. 405.

This leads me to inquire whether they have so found in the present case. What they say is this: "We found that the said sum of 300,000*l.* was an expenditure of a capital nature to secure an enduring benefit for the Company's trade by getting rid of an onerous contract." If this be a finding that by getting rid of the agreement of May 6, 1914, the Company secured an enduring benefit for its trade it would, as it seems to me, be a finding of fact, and one therefore which the Court must treat as conclusive if there was evidence upon which it could reasonably have been made. But I cannot help thinking that the finding is not addressed so much to the particular contract that was got rid of in the present case as to onerous contracts in general; that the Commissioners, in other words, were of opinion that the getting rid by a company of an onerous contract always secured an enduring benefit for its trade. This was the view of the finding that was taken by Rowlatt J. After referring to the finding, he said this: "In my judgment that is a finding which is perfectly inconclusive. It does not deal with the question. The question is not merely getting rid of an onerous contract but an onerous contract for what." I agree. If a contract be onerous simply and solely because it entails a heavy drain upon the annual revenue of the Company, the Company will not secure an "enduring" benefit for its trade by getting rid of it. Yet looking at the special case, it would appear that the Commissioners thought that it necessarily would. For there is nothing in it from beginning to end to suggest that the Company in fact secured an enduring benefit such as was referred to by Lord Cave. We are told that Lord Inchcape gave evidence on behalf of the Company to the effect that the cancellation of the agreement had resulted in a considerable economy and saving in working expenses, and this revenue benefit is the only one referred to. The Case nowhere refers to any evidence of the Company having obtained any capital benefit, nor do the Commissioners in any way intimate in what respect the trade of the Company was benefited, except in the way indicated by Lord Inchcape.

In these circumstances the finding of the Commissioners cannot in my opinion be treated as conclusive, and it is therefore incumbent upon the Court itself to decide the question whether the fixed capital of the Company has or has not been benefited by the expenditure of the 300,000*l*. In my judgment this question must be answered in the negative. When the negotiations with Strick, Scott & Co. that ultimately led to a cancellation of their agreement were first set on foot, the only reason suggested by the Company's chairman was that the commissions then being earned by the agents were much in excess of the amount anticipated at the time the agreement was entered into, and it was merely a modification and not a cancellation of that agreement that was contemplated. I can find no indication that any enduring advantage to the Company's trade from a capital point of view was being sought, nor was it suggested that any such advantage would be gained in fact. It is true that the committee of directors appointed to negotiate with Strick, Scott & Co. reported on September 28, 1922, that in addition to the large saving to the Company that would be effected by the cancellation of the contract with them there would be other material advantages, but the committee did not explain what those advantages would be. They might well have been and probably were merely revenue advantages. For myself at any rate, I cannot see what other advantages could accrue to the Company from the cancellation. The result would merely be that the Company would be represented in the East by agents other than Strick, Scott & Co., for it is obvious that being a corporation it must have agents of some sort out there. Those agents would no doubt be employed on terms more favourable to the Company than those contained in the agreement of May 6, 1914, and it may well be that the Company would retain a greater measure of control over such agents than they could over Strick, Scott & Co. All this would lead to the

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economy and saving in working expenses spoken of by Lord Inchcape. Of any further advantage than this there is no evidence. Except for the change of agents, and for all that I know to the contrary, the business of the Company continued exactly as it was before the change. I cannot find that any advantage or benefit either positive or negative accrued to the capital of the Company by the expenditure of the 300,000*l.* All the advantage and benefit that it brought seems to have been merely of a revenue character.

In my opinion this appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *The Solicitor of Inland Revenue.*
Solicitors for respondents: *Linklaters & Paines.*

W. I. C.

Dictum of ROMER, L.J., at p. 172, *applied.* *Re* BLAND-SUTTON'S WILL TRUSTS. [1950] 2 All E.R. 466.

[1932] 1 K. B. 149. INST. OF CIVIL ENGINEERS *v.* INLAND REV. COMR.

Applied. In re BLAND-SUTTON, DECD.
[1951] 1 Ch. 70

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May 11, 12, 13; *June* 8.

Revenue—Income Tax—Institution for General Advancement of Mechanical Science—Members' Right to describe themselves as such—Right to Exemption from Income Tax—Charitable Purposes only—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37, *sub-s.* 1 (*b*).

The Institution of Civil Engineers was founded in 1818 and incorporated by Royal Charter in 1828. The object of the Institution was "the general advancement of mechanical science and more particularly for promoting the acquisition of the species of knowledge which constitutes the profession of a civil engineer." By supplemental charters the Institution was given an extended power to purchase and hold land and power to pass by-laws, and members were given power to describe themselves as members of the Institution. The Institution held examinations for persons desirous of being admitted as students or elected as members or associate members, and the Council of the Institution had power to frame regulations for these examinations. The Institution awarded many medals, premiums, prizes and scholarships. It also possessed a valuable library of great advantage to consulting engineers. The library was by the by-laws open to members, associates and students, but members of the public were also admitted. The Council had power to grant the use of rooms of the Institution to

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persons desirous of having lectures on subjects connected with the objects of the Institution. The Institution produced a number of publications. It had been consulted by various Government Departments and public bodies upon matters relating to engineering. Membership of the Institution was not necessary to enable a person to practise engineering:—

Held (reversing the decision of Rowlatt J.), that the Institution was "a body of persons . . . . established for charitable purposes only," and was therefore exempt from income tax under s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918. Any benefit which enured to the Institution's members was merely incidental and subsidiary, and these other activities did not represent a collateral or independent purpose.

Inland Revenue Commissioners v. *Forrest* (1890) 15 App. Cas. 334 applied.

APPEAL from a decision of Rowlatt J. on a Case stated under the Finance Act, 1925, s. 19, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on March 19, 1930, the Institution of Civil Engineers (hereinafter called "the Institution"), being aggrieved by a decision of the Commissioners of Inland Revenue on a claim made by the Institution for exemption from income tax under the provisions of s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918, for the years ending April 5, 1927, 1928 and 1929, applied to have its claim for exemption heard and determined by the Special Commissioners.

The Institution was founded in 1818, and was incorporated by Royal Charter dated June 3, 1928. The object for which the Institution was founded was "the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man."

By a Supplemental Charter dated August 3, 1887, the Institution's powers of purchasing and holding lands, tenements and hereditaments were extended.

By a Supplemental Charter dated March 20, 1896, the Institution was empowered to pass by-laws altering and enlarging the composition of the Council of the Institution and the method of recording the votes of the members of the Institution at elections to the said Council.

By a Supplemental Charter dated February 24, 1922, a member or an associate member of the Institution was empowered to take and use the name, title of, or describe himself as a member or an associate member (as the case might be) of the Chartered Institution of Civil Engineers, an alteration was made in the method of voting at special general meetings of the Institution, and provision made for voting by all corporate members on proposals for alteration of by-laws or regulations. The object of the Institution as defined by the by-laws is the advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer. The Institution consists of members, associate members, associations entitled to the privileges of corporate membership and honorary members. It also has attached to it associates not entitled to the privileges of corporate membership and students not entitled to such privileges. The rules relating to the qualification of and election to the various classes of membership of the Institution are set out in the by-laws of the Institution.

The by-laws lay down certain rules as to professional conduct to be observed by all corporate members of the Institution. The direction and management of the concerns of the Institution are vested in the Council.

The regulations as to the constitution of and election to the Council are set out in the by-laws.

The annual subscription, transfer and entrance fees and life composition fee payable by members, associate members and associates and the annual subscription payable by students are at rates fixed by the Council from time to time.

Examinations are held for persons desirous of being admitted as students or elected as members or associate members, and the Council are empowered to frame regulations for such examinations. No certificates are granted in respect of passes in these examinations, the results being merely recorded

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in connection with the applications for membership or studentship.

The Institution awards a number of medals, premiums, prizes and scholarships for which persons who are not members of the Institution are eligible to compete equally with members, except in certain cases in which the award is provided out of trust funds under conditions laid down by the testator or donor expressly limiting eligibility to members or students of the Institution. The Institution also awards one examination prize out of a trust fund; eligibility for this prize is not confined to candidates who belong to the Institution. Scholarships are also awarded for educational purposes out of trust funds bequeathed or given to the Institution. Eligibility for these scholarships is, in some cases, confined to students of the Institution or the children of members by the terms of the bequest or gift.

The property and effects of the Institution are vested in the corporate members for the time being for the use of the body politic and corporate solely, in furtherance of the public and scientific objects contemplated in the charters.

The Institution possesses and maintains a valuable library, which (subject to such variations as the Council may direct) is open daily for the use of all members, associates and students of the Institution. The library contains many plans of important public works as well as scientific books and publications, and is of great advantage to consulting engineers and others using it. Though under the by-laws the library is open to members only, members of the public, that is to say persons who are not members of the Institution, are permitted to use the library free of charge, and considerable use is made of this privilege.

The Council have power to grant the use of the rooms of the Institution to any society for purposes analogous to those of the Institution and to any persons who may be desirous of having lectures delivered on subjects connected with the objects of the Institution.

The session of the Institution commences annually in November and continues until the end of the following April.

The meetings of the Institution are as follows :—

(*a*) The annual general meeting, at which the annual report of the Council together with the annual statement of accounts is presented and considered, and the Council and auditors of the Institution for the ensuing year are elected.

(*b*) Ordinary meetings, which are held once a fortnight during the session or more often if found necessary.

At these meetings communications on engineering and scientific subjects are read and discussed.

(*c*) Special general meetings of corporate members only for the purpose of making, altering and establishing by-laws or for any other special business.

The Council have power to arrange for supplementary meetings for the discussion of engineering subjects.

Every corporate member of the Institution has the privilege of introducing at every ordinary meeting one stranger. The public at large is not admitted, but in practice strangers who are particularly interested in any subject which is to be discussed are admitted on request. Members of the public avail themselves of this privilege. Invitations to attend ordinary meetings are sent out to other societies, and papers are accepted for discussion from members of other societies and persons who are not members of the Institution, and such of these papers as are of merit are published by the Institution and sent out to members of other societies.

The following publications are produced by the Institution :

(*a*) Minutes of proceedings in which are published papers read at meetings and the discussions thereon. The bound volumes of these proceedings cannot be purchased by the public.

(*b*) Selected engineering papers, being those original papers not deemed to be suitable for discussion which are ordered by the Council to be published.

(*c*) Reports of lectures. Up to 1889 the Institution has published thirty lectures. Since 1889 it has published seventy-three.

(*d*) Engineering abstracts, from the current periodical literature of engineering and applied science published outside the United Kingdom.

(*e*) Reports of engineering conferences.

(*f*) Reports of the education and training of engineers.

All the foregoing publications with the exception of bound volumes of the minutes of proceedings can be obtained by members of the public at large, in many cases gratis, in other cases at stated prices, in no case at a profit. Any individual paper contained in the bound volumes of the minutes of proceedings can be obtained by members of the public gratis.

The minutes of proceedings of the Institution are supplied free of charge to all corporate members of the Institution paying the full annual subscription. Presentation copies of the minutes of proceedings and selected engineering papers are supplied gratis to many societies, universities and libraries, both in the United Kingdom and abroad. In some cases such societies, universities, and libraries supply to the Institution gratis copies of their transactions.

The engineering abstracts are available to members of the public at less than cost price.

Since the Institution was established upwards of 400,000*l.* has been spent by the Institution upon its publications.

The Institution has been and is consulted by various Government departments and public bodies upon matters relating to engineering, and has constantly been asked by such departments and bodies to nominate members to sit upon committees.

It was consulted by (among others) the Committee for the preservation of St. Paul's Cathedral.

Members of the Institution have sat without reward upon a number of public committees upon engineering subjects.

A committee of the Institution dealing with "the Deterioration of Structures exposed to Sea Water" received financial aid from the Government, and this is the only instance in which financial assistance has been received by the Institution towards payment of the actual out of pocket expenses.

Mr. W. W. Grierson, the president of the Institution, gave evidence before us, and in addition to proving many of the facts hereinbefore set forth, stated :—

(*a*) Membership of the Institution was not necessary to enable a person to practise as a civil engineer. Many eminent civil engineers were not members of the Institution. For example, among those holding higher positions in the technical engineering departments of the four railway groups, about two-thirds only were members. He did not think that, other things being equal, a man who was a member of the Institution would have a professional advantage over a man who was not. He gave as instances in which the post of chief engineer had been filled by appointment of a man who was not a member of the Institution, one of the ministries and three cities in Great Britain.

(*b*) Membership of the Institution carried a certain amount of prestige, but he did not consider it had helped him professionally.

(*c*) He agreed that the expectation of professional advantage was one of the reasons which prompted him to join, and would probably be one reason why others joined the Institution.

(*d*) The Institution did not arbitrate on disputes between members.

(*e*) The president of the Institution in his personal capacity sometimes nominates, on request, engineers for some public work. Such requests had been received from (among others) the India Office, the Admiralty, the War Office, the Ministry of Transport, Oxford University, National Physical Laboratory, and the Ministry of Agriculture and Fisheries. The individual nominated is not always a member of the Institution.

(*f*) In 1912 it sent a letter to the Prime Minister of the day calling attention to the need of employing competent engineers for public works.

(*g*) The membership of the Institution now numbered about 10,000 persons.

A benevolent fund for the benefit of members and their families was established in 1864 by individual members of the Institution.

It was contended on behalf of the Institution that :—

(*a*) The Institution is a body of persons established for charitable purposes only.

(*b*) Its income is applicable to and is applied to charitable purposes only.

(*c*) It was entitled to the exemption claimed.

It was contended on behalf of the Commissioners of Inland Revenue (inter alia) :—

(*a*) That while the work of advancing mechanical science, which the Institution performed, was a charitable purpose, it was not the only object which the Institution pursued.

(*b*) That a substantial object of the Institution was the benefit of its members by way of professional advantage.

(*c*) That the Institution was not therefore established for charitable purposes only, and accordingly was not entitled to the exemption conferred by s. 37, sub-s. 1 (*b*), Income Tax Act, 1918.

Having considered the arguments and evidence adduced before us we decided as follows :—

Though we are satisfied that the main object of the Institution is the general advancement of mechanical science, we find that a substantial part of its object is to benefit the members of the Institution.

In the case (for example) of the Supplemental Charter of February 24, 1922, and the report of the Council for the year 1926–27 . . . . we cannot treat the benefit of members as a negligible object of the Institution, nor can we regard the benefits conferred upon members as merely incidental to the main purpose of the Institution. The appeal therefore fails.

The Institute of Civil Engineers appealed.

The effect of the charters and by-laws, which were attached to the Case, sufficiently appear from the Case and judgments.

Rowlatt J. said that the question was whether the Institution was a body of persons established for charitable purposes only. In *Inland Revenue Commissioners* v. *Forrest* (1) the position of the Institution under an analogous statute was considered, but it seemed plain that in the view of the majority of the House of Lords, it was no objection to the claim of the Institution to be exempt from duty that it might not be a charity. It did not matter if the Institution had another collateral object, which was not exclusively for the promotion of science. Therefore the discussion in the House of Lords whether there was a professional advantage conferred, or professional objects included, went to the question whether there were such objects as negatived the proposition that the Institution was for the promotion of science. They were not investigating whether there was another object collateral to the promotion of science. In the present case it was necessary to see whether this Institution was established for charitable purposes only. The word "only" did not involve a decision that the purpose was not charitable "only," if incidentally some advantage was given to members or subscribers. It might be incidental that in the pursuit of a charitable object benefit enured to particular people in the course of events. But if there was an object like the promotion of the profession in addition to the promotion of science, that was not incidental, but collateral. It was that collateral advantage which in his (his Lordship's) opinion existed here. On the charter of the Institution and its by-laws he found that although one of the objects of the Institution was undoubtedly to enlarge the knowledge of mankind in regard to mechanical science, the Institution had also as an object the organization of the profession of civil engineers by giving those who passed the necessary examination and became members of the Institution the exclusive right to affix to their names certain designations. The members became known to the public as persons belonging to the Institution, and as members they were required to observe certain rules for the protection of clients. That was collateral to the acquisition or spread of knowledge of mechanical science, and was an object which could on no view be called charitable.

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(1) 15 App. Cas. 334.

The appeal must be dismissed.

The Institution appealed. The appeal was heard on May 11, 12 and 13, 1931.

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Latter K.C. and *Cyril King* for the appellant Institution.

Hon. Sir Stafford Cripps S.-G. and *R. P. Hills* for the respondents.

[In the course of the arguments the following cases were cited: *In re Duty on Estate of Institution of Civil Engineers* (1); *General Medical Council* v. *Inland Revenue Commissioners* (2); *In re Bootham Strays, York* (3); *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (4); *In re St. Bride's, Fleet Street, Church or Parish Estate* (5); *Reg.* v. *Institution of Civil Engineers* (6); *Art Union of London* v. *Overseers of the Savoy* (7); *Royal College of Music* v. *Westminster Vestry* (8); *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society* (9); *Geologists' Association* v. *Inland Revenue Commissioners* (10); *Beaumont* v. *Oliveira* (11); *Rex* v. *Special Commissioners of Income Tax* (12); *Midland Counties Institution of Engineers* v. *Inland Revenue Commissioners* (13); *General Nursing Council for Scotland* v. *Inland Revenue Commissioners* (14); *In re Royal College of Surgeons of England* (15); and *Royal Agricultural Society of England* v. *Wilson.* (16)]

June 8. Their Lordships read the following judgments:—

LORD HANWORTH M.R. The Institution of Civil Engineers was founded in 1818, and was incorporated by Royal Charter dated June 3, 1828. The object for which it was founded was "the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man."

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(1) (1887) 19 Q. B. D. 610; in C. A. (1888) 20 Q. B. D. 621; in H. L. sub nom. *Inland Revenue Commissioners* v. *Forrest,* 15 App. Cas. 334.

(2) (1928) 13 Tax Cas. 819.

(3) (1892) 3 Tax Cas. 134.

(4) [1891] A. C. 531.

(5) (1887) 35 Ch. D. 147*n*.

(6) (1879) 5 Q. B. D. 48.

(7) [1894] 2 Q. B. 609; in H. L. sub nom. *Overseers, &c., of the Savoy* v. *Art Union of London* [1896] A. C. 296.

(8) [1898] 1 Q. B. 304.

(9) [1928] 1 K. B. 611.

(10) (1928) 14 Tax Cas. 271.

(11) (1869) L. R. 4 Ch. 309.

(12) (1925) 10 Tax Cas. 73.

(13) (1928) 14 Tax Cas. 285.

(14) (1929) 14 Tax Cas. 645.

(15) [1899] 1 Q. B. 871.

(16) (1924) 9 Tax Cas. 62.

The Charter conferred the power upon general meetings of the Institution of making and establishing "such by-laws as they shall deem to be useful and necessary for the regulation of the said body politic and corporate, for the admission of members, for the management of the estates, goods, and business of the said body politic and corporate, and for fixing and determining the manner of electing the president, vice-presidents and other members of the Council," and other details of administration. It was also declared that "no resolution, or by-law, shall on any account or pretence whatsoever be made by the said body politic and corporate in opposition to the general scope, true intent, and meaning of this our Charter, or the laws or statutes of our Realm."

Supplemental Charters were granted on August 3, 1887, and March 20, 1896, respectively, to extend the powers of the Institution in purchasing and holding lands, and for enlarging the composition of the Council and the method of recording the votes of members at elections to the Council.

By another Supplemental Charter, dated February 24, 1922, a member and an associate member of the Institution was empowered to "take and use the name, title of, or describe himself as a member or an associate member (as the case may be) of the Chartered Institution of Civil Engineers"; an alteration was made in the method of voting at special general meetings of the Institution, and provision was made for voting by voting papers, and not personally, by all corporate members, on proposals for alteration of by-laws or regulations.

This Charter recited that "the Institution has continuously throughout its existence actively carried out the main object of its original Charter and fostered and increased the knowledge of the art and science of the profession of Civil Engineering and has in various ways set out in the petition taken all possible steps to secure that persons before being admitted as corporate members of the Institution shall possess such knowledge as should be possessed by a competent civil engineer and should be of good reputation."

The Charter also recites "that notwithstanding that the Institution is one of the oldest chartered professional bodies and is the representative body of civil engineers in Great Britain, there is nothing to prevent any person who chooses so to do, from calling himself a Civil Engineer." Then in the operative part of the Charter, the right to take and use the title of member of the Institution of Civil Engineers or associate member of the Institution of Civil Engineers is conferred.

The by-laws are directed to securing that the members of the Institution, whether full members, associate members or associates entitled to the privileges of corporate membership, shall possess certain qualifications. Candidates for election into the class of associate members are to possess the stipulated qualifications and to have passed certain examinations. In short these by-laws and regulations are designed to fix and maintain a high standard of knowledge and experience among all the members.

The Institution provides a library for the use of members, but does not provide what may be termed club amenities. It awards a number of prizes, some of which are provided out of its own funds, and many out of trust funds which have been assigned to it for administration.

An outstanding activity of the Institution is the publication of papers, lectures, transactions, abstracts, and the like, all intended for the dissemination of knowledge of special value to those who are engaged in civil engineering. On this head the Institution has since it was established spent upwards of 400,000*l*.

The full story and activities of the Institution are set out in the Case, and it is unnecessary to repeat them in this judgment.

The Institution claims that it is a body of persons established "for charitable purposes only," and as such entitled to the exemption from income tax allowed under s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918.

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The Crown admit that the work of advancing mechanical science which the Institution performed was a charitable purpose within the above section; but they claim that such was not the only object or purpose which the Institution pursued; that a substantial object of the Institution was the benefit of its members by way of professional advantage, and therefore that it fails to satisfy the conditions laid down in s. 37.

The Commissioners were satisfied that the main object of the Institution is the general advancement of mechanical science, but found that a substantial part of its object is to benefit the members of the Institution. They held that the benefit of members could not be treated as a negligible object of the Institution, and that the benefits conferred on members were not merely incidental to the main purpose of the Institution. They therefore rejected the claim of the Institution. Rowlatt J., on appeal, confirmed this decision, and hence the appeal to this Court.

Rowlatt J. decided that the present case falls into line with the cases of *Rex* v. *Special Commissioners of Income Tax. Ex parte Headmasters' Conference* (1); *General Medical Council* v. *Inland Revenue Commissioners* (2); *Geologists' Association* v. *Inland Revenue Commissioners* (3); *General Nursing Council for Scotland* v. *Inland Revenue Commissioners* (4), in which the claimants were held not entitled to the immunity, because their objects were not "only" those that are comprised by the word "charitable." There was in each case some other purpose personal and advantageous to the members.

As Rowlatt J. has said, there may be a charitable institution for the relief of sickness, and incidental advantages can be gained by a subscriber to the funds, without the institution losing its character; but if there is an object, e.g., the promotion of the profession in addition to the promotion of science that is collateral and not merely incidental, the result is that the institution cannot be described as established for charitable purposes only.

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(1) 10 Tax Cas. 73.
(2) 13 Tax Cas. 819.
(3) 14 Tax Cas. 271.
(4) 14 Tax Cas. 645.

I confess that I have a difficulty in attaching the same weight as was given to it by the Commissioners and the learned judge to the fact that members of the Institution can attach letters as suffixes to their names. The requirement of the Institution whereby its members have to possess an adequate qualification does not appear to me to connote an advantage, amounting to a collateral purpose in the sense above. That its members should bring a certain knowledge and capacity for learning to the Institution seems only to confirm its purpose of the general advancement of mechanical science and knowledge.

Whether the members are to be easily distinguished by letters attached to their names, or are generally held in estimation by belonging to the Society, seems a matter of small moment to the present decision. It is not unknown that belonging to one or another college in our ancient universities carries with it a distinction; and a suffix after the name only serves to identify the qualification thus possessed with less effort to an inquirer.

The Commissioners attach importance to a statement made in the report of the Council for the year 1926–7 relating to the fact that the protection of the interests of members is engaging the Council's earnest attention. In its context this seems to relate to endeavours to prevent "any impairment of the liberty of professional practice now enjoyed by members, or of the standing which their qualifications attested by the Institution give them"; and a note to this to the effect that the members ought to help themselves seems to prevent the inference that the Institution is acting as a trade union on behalf of its members, and not rather with a view to the preservation of the position held by members.

It must be remembered that they were entrusted from the first with carrying out the main object of the Institution. There is no doubt that full publicity is given to the researches and information made and obtained by the members. This is a not unimportant feature: see *Beaumont* v. *Oliveira* (1), and no profit is distributed to the members.

(1) L. R. 4 Ch. 309.

The question of law that arises upon these matters of fact is this: do these other activities represent a collateral or independent purpose, or are they subsidiary and incidental to the main object for which the Institution was started and incorporated?

Before answering these questions it is important to recall that this Institution has figured in several proceedings in the Law Courts, and in cases which have been reported in the books, where a number of expressions are recorded that fell from eminent judges upon the purpose and work of the Society.

In the first, *Reg.* v. *Institution of Civil Engineers* (1), it was held "not to be released from paying its rates under the Act which gave exemption to land and buildings belonging to any Society instituted for the purpose of science exclusively."

That decision, however, appears not to be consistent on this point with *Inland Revenue Commissioners* v. *Forrest.* (2) Two conditions had to be fulfilled in order to obtain exemption from the rates. The Institution failed in the condition which required it to be supported "wholly or in part by annual voluntary contributions" and the other feature which thus was not essential, appears to conflict with the views expressed by Lords Watson and Macnaghten in *Forrest's* case (3); and see per Hawkins J. in *Royal College of Music* v. *Westminster Vestry* (4), where he holds the decision as to the rates to be overruled.

In 1887 the question arose whether the Institution was liable to the duty imposed upon the annual value, income or profits of property belonging to a body corporate under s. 11, sub-s. 3, of the Customs and Inland Revenue Act, 1885, which contained an exemption in favour of "property . . . . appropriated and applied . . . . for any charitable purpose, or for the promotion of education, literature, science, or the fine arts." The Queen's Bench Division held (5) that the appellants

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(1) 5 Q. B. D. 48.

(2) 15 App. Cas. 334.

(3) Ibid. 348, 353.

(4) [1898] 1 Q. B. 304, 313.

(5) *In re Duty on Estate of Institution of Civil Engineers*, 19 Q. B. D. 610.

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did not come within the exemption. This decision was reversed by a majority of the Court of Appeal (1), and this latter decision was affirmed by a majority of the House of Lords. (2)

Lord Halsbury, in a dissenting speech (3), disclaimed that any importance attached to the adverb "exclusively." If the property was in fact appropriated and applied to science, it was so, and the adverb could not alter or attach a different measure to that fact. Lord Watson (4) seems to accept the principle that, if not exclusively, yet certainly in the main, and as its chief object, the income is devoted to science, the exemption in the case before him could be held to have been deserved. He says (5): "The mere fact that membership is confined to those who are actively engaged, and have attained some degree of eminence, in the profession, does not militate against the object of the institution being the advancement of engineering science; because they are really the only persons possessing the knowledge and practical experience requisite for the efficient promotion of that object. Membership is not required for admission to the profession of a civil engineer: it confers no rights or privileges in the practice of that profession, over which the institution neither has, nor professes to have any power of control." And later on (6): "The discussion of mechanical and engineering problems, by the members of the institution, cannot fail to elicit information and speculation of value to the profession at large, and of advantage to all interested in the various departments of the science, for whose use everything read or spoken by members is recorded in the printed minutes, and constitutes a substantial addition to the sum of human knowledge. It occurs to me that, if any one were asked to say what would be a more efficient method of promoting engineering science than that which the institution has adopted, he would have difficulty in making a satisfactory reply."

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(1) 20 Q. B. D. 621.

(2) *Forrest's* case, 15 App. Cas. 334.

(3) Ibid. 340.

(4) *Forrest's* case, 15 App. Cas. 349.

(5) Ibid. 350.

(6) Ibid. 351.

Lord Macnaghten (1) propounds the question which has to be answered in this case: "Is the property of the Institution of Civil Engineers legally appropriated and applied for the promotion of the science of civil engineering, or is it legally appropriated and applied for the benefit of civil engineers in order to enable them to practise their profession to greater advantage?" And he sums up the position as follows (2): "I cannot conceive in what better way the promotion of mechanical science, and in particular of those branches of mechanical science which lie within the province of civil engineering, could be effected. I cannot doubt that by means of the discussions on the papers read at the ordinary meetings of the society much new light has been thrown on scientific questions and much knowledge, which would otherwise have perished, has been preserved. I see no trace of a selfish or illiberal spirit in the proceedings of the society, nor do I find anything to lead me to suppose that its property and income are applied otherwise than bona fide for the promotion of science. The action of the society may incidentally benefit the profession to which its members belong—I have no doubt that is so—but I agree with the Master of the Rolls in thinking that 'that which this society does is something higher and larger than the mere education of students and others for the profession of civil engineer.'"

It is argued that the Charter of 1922 and the statement in the report of 1926–7 serve to cancel these opinions and to prove that now there is a collateral purpose carried on by the Institution.

I cannot think so. Such a view seems to ignore the broad lines indicated in the two speeches quoted above in which incidental advantages to members are not overlooked, but which nevertheless indicate the true character attaching to the Institution. This view appears to have commended itself to Romer L.J. in *In re Royal College of Surgeons of England.* (3) He speaks of the Institution as having only one main object and purpose.

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(1) *Forrest's* case, 15 App. Cas. 354. (2) *Forrest's* case, 15 App. Cas. 356.
(3) [1899] 1 Q. B. 871, 883.

The case of *Inland Revenue Commissioners* v. *Forrest* (1) has received further interpretation. In the case of *Art Union of London* v. *Overseers of the Savoy* (2) A. L. Smith L.J. quotes a passage from the speech of Lord Watson (3) and comments (4): "I understand by this that, if the other object be an object distinct from and not connected with the fine arts, then the society, even though that object be altogether subsidiary, has not as its exclusive object the promotion of the fine arts, but, if the other object be only a means to the one end, i.e., as in this case, ... then the society has a sole and exclusive object, and not another object subsidiary thereto."

A. L. Smith L.J. differed from the majority of the Court in the Court of Appeal, but in the House of Lords (5) his view was upheld. Lord Macnaghten (6) points out that where a society is incorporated and its purpose defined by charter or statute, it is not right to confuse the purpose of the society with the object of individual members in joining it. And Lord Shand affirms the same distinction. Finally Lord Macnaghten in *Forrest's* case (7) does not overlook the advantages that may enure to the members of the Institution. His words are: "It cannot I think be doubted that the institution has raised the standard of the profession, and that to a civil engineer it is of advantage and probably of pecuniary advantage to be a member. But is that result the purpose of the society, or is it an incidental, though an important and perhaps a necessary consequence of the way in which the institution does its work in the pursuit of science?"

After these careful criticisms and incisive analyses of the object and purpose of the Institution and the effect of membership upon engineers who belong to it, the House of Lords held that it was exempt as being carried on for the promotion of engineering science, and not for the promotion of the professional interest or advantage of the members.

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(1) 15 App. Cas. 334.
(2) [1894] 2 Q. B. 609.
(3) 15 App. Cas. 348.
(4) [1894] 2 Q. B. 627.
(5) [1896] A. C. 296.
(6) Ibid. 313.
(7) 15 App. Cas. 354.

In my judgment this Court must give effect to the opinion of the House of Lords—expressed it is true in relation to another statute, but based on reasoning which applies to the present case—and must hold that the Institution comes within the exemption allowed under s. 37, sub-s. 1 (*b*), of the Income Tax Act.

The appeal must be allowed with costs here and below and the assessments discharged.

LAWRENCE L.J. The question in this case is whether the Institution of Civil Engineers is a body of persons established for charitable purposes only and therefore exempt from income tax under s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918.

The answer to this question depends upon whether the Institution is established solely for the advancement of the science of civil engineering (an admittedly charitable purpose), or whether one of the purposes for which it is established is to benefit civil engineers in order to enable them to practise their profession to greater advantage.

It is unnecessary to recapitulate the circumstances under which the Institution was established or to state the nature of its activities, as these are fully set forth in the Case and summarized in the judgment delivered by the Master of the Rolls.

The question to be determined is by no means easy, and is one upon which different minds may well take different views; but the reasoning of Lord Macnaghten in *Forrest's* case (1) (although that case was concerned with the interpretation of an enactment which differs in language from the relevant enactment in the present case) has led me to the conclusion that this appeal ought to be allowed. Previously to the decision in *Forrest's* case (1) the purpose for which the Institution was established had come under consideration in *Reg.* v. *Institution of Civil Engineers.* (2) In that case the Divisional Court held that the Institution was not a society established for the purpose of science exclusively within s. 1 of the Scientific Societies Act, 1843. Under that Act,

(1) 15 App. Cas. 334.

(2) 5 Q. B. D. 48.

a society, in order to obtain immunity from parochial rates, had to comply with two conditions: first, the society had to be instituted exclusively for the purposes of science, literature, or the fine arts, and secondly, it had to be supported in whole or part by annual voluntary contributions. The case came before the Divisional Court on a Case stated by the Middlesex Quarter Sessions. According to the report no reference was made either in the Case or by counsel or by the Court to the second condition. This may have been due to the fact that at that date certain cases had determined that the annual subscriptions of the members of such a society were voluntary contributions within the meaning of the Act. Whatever may have been the reason, however, the case was decided solely on the ground that the primary purpose for which the society was established was not the promotion of the science of engineering generally but the edification and instruction of its members with the view to enabling them the better to practise their profession as civil engineers, and consequently that the Institution was not established exclusively for the purpose of science. It is important to observe that, although the Act of 1843 contains the word "exclusively," the Divisional Court considered that the point which it had to decide was substantially the same as the point which Lord Macnaghten considered to be decisive in *Forrest's* case. (1)

In the case before the Divisional Court Field J. puts the point as follows (2): "If the advancement and acquisition of science taken generally is the main and substantial object of the association, then the necessary concomitant of advantage and enjoyment to the individual does not destroy the exemption. And, in like manner, if the primary and substantial purpose of the institution is the advantage and gain of a particular body of professional men exercising a professional art by which to earn their livelihood, the fact that those objects are gained by the discussion and promotion of such science as if applied to their art will advance their individual and professional interests will not protect the society from taxation." In *Forrest's* case (1) Lord Macnaghten

(1) 15 App. Cas. 334.

(2) 5 Q. B. D. 52.

states the point which the House of Lords had to decide as follows (1): "Is the property of the Institution of Civil Engineers legally appropriated and applied for the promotion of the science of civil engineering, or is it legally appropriated and applied for the benefit of civil engineers in order to enable them to practise their profession to greater advantage?" In my opinion the answer given by the Divisional Court to the question propounded by Field J. is inconsistent with the answer given by the majority in the House of Lords to the question propounded by Lord Macnaghten in *Forrest's* case. (2) The fact that Lord Macnaghten although disagreeing with the reasoning on which the conclusions reached by the Divisional Court was based, yet agreed in the conclusion itself may perhaps be explained on the ground that in his opinion the Institution was not wholly or partly supported by annual voluntary contributions. Lord Watson was plainly not satisfied with the view taken by the Courts that the annual subscriptions of the members were voluntary contributions within the meaning of the Act of 1843. (3) This point was eventually set at rest by the decision of the House of Lords in the *Art Union of London* case. (4) Lord Halsbury in his dissenting judgment in *Forrest's* case (2), when comparing the Act of 1843 with the Act of 1885, said of the latter Act (5), "the omission of the word 'exclusively' means nothing, since its existence or non-existence could add nothing to the true construction of the words that are there." It is evident from the way in which Field J. framed the question which he had to decide in the Divisional Court that he was of the same opinion as Lord Halsbury as to the weight to be attached to the word "exclusively." On the other hand, both Lord Watson and Lord Macnaghten lay emphasis on the difference of language between the two enactments. In this connection it is useful to refer to what Lord Macnaghten subsequently said in the *Art Union of London* case (6) (which was concerned with the interpretation of the Act of 1843): "It has been

(1) 15 App. Cas. 354.
(2) 15 App. Cas. 334.
(3) Ibid. 348.
(4) [1896] A. C. 296.
(5) 15 App. Cas. 340.
(6) [1896] A. C. 313.

held in several cases that where a contributor derives personal advantage from being a member of a society, the society, though formed for one of the purposes favoured by the Act, cannot be considered as formed for that purpose 'exclusively.' This mode of construction may be admissible when the society is not incorporated, and its purpose . . . . is not defined by charter or statute. When, however, that is the case, it seems to confuse the purpose of the society with the object of individual members in joining it."

Hawkins J., in his judgment in *Royal College of Music* v. *Westminster Vestry* (1) (affirmed by the Court of Appeal (2)), came to the conclusion that the effect of the judgment of the House of Lords in *Forrest's* case (3) was virtually to overrule the case of *Reg.* v. *Institution of Civil Engineers.* (4) Having regard to the fact that the decision in the latter case was based entirely on the ground that the promotion of science was not the primary purpose for which the Institution was established, I think that Hawkins J. was clearly right in his conclusion.

The main contention on behalf of the Crown in the present case is that one of the purposes for which the society was established was to benefit civil engineers in their profession, and that therefore the Institution was not established for charitable purposes only. The answer to this contention is, I think, to be found in the following passages of Lord Macnaghten's judgment in *Forrest's* case (5): "It cannot I think be doubted that the institution has raised the standard of the profession, and that to a civil engineer it is of advantage and probably of pecuniary advantage to be a member. But is that result the purpose of the society, or is it an incidental, though an important and perhaps a necessary consequence of the way in which the institution does its work in the pursuit of science?" and the answer to this question is summed up by Lord Macnaghten as follows (6): "The action of the society may incidentally benefit the profession to which its members belong—I have no doubt that is so—but I agree with the Master of the Rolls in thinking that 'that which this Society does is something higher and larger than the mere education of students and others for the profession of civil engineer.'"

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(1) [1898] 1 Q. B. 304.
(2) [1898] 1 Q. B. 809.
(3) 15 App. Cas. 334.
(4) 5 Q. B. D. 48.
(5) 15 App. Cas. 354.
(6) Ibid. 356.

In view of the contention that the Institution is not established for the promotion of science only, because under the supplemental Charter of 1922 a civil engineer is entitled to advertise the fact that he is a member of the Institution by placing the initials M.I.C.E. after his name or otherwise, the following passage in the judgment of Fry L.J. in *Forrest's* case (1) is peculiarly apposite: "It has been pressed upon us that the membership in this society is of pecuniary value to engineers, and I have no doubt that that is the case: but the observation does not appear to me to go far. It is obvious that membership in many bodies formed for the cultivation of science is of pecuniary value to certain classes of persons. A fellowship in the Royal Society is undoubtedly of pecuniary value to medical men, to engineers, chemists, and others; nevertheless it is plain that the object of that society is the promotion of science."

Bearing in mind that the original charter of 1828 clearly states the only purpose for which the Institution was established, and that this purpose has never been added to or varied by any of the supplemental charters, and further bearing in mind that the House of Lords has decided that this purpose is for the general advancement of the science of civil engineering, it follows in my judgment that the Institution is established for a charitable purpose only, notwithstanding that it is of advantage to a civil engineer in his profession to be a member of the Institution, this result not being a purpose for which the Institution was established but being incidental to and consequent upon the way in which the Institution carries out the charitable purpose for which alone it was established.

For the reasons stated, I agree that this appeal ought to be allowed.

(1) 20 Q. B. D. 631.

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ROMER L.J. The question to be decided on this appeal is whether the Institution of Civil Engineers is a "body of persons" established for charitable purposes only within the meaning of s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918, the expression "body of persons" being defined by s. 237 of the Act to mean, amongst other things, a body corporate, which the Institution undoubtedly is.

In order to answer this question, it is necessary to ascertain in the first place the meaning of the word "only" as used in the sub-section. Upon this point there is some authority. In the case of *Reg.* v. *Institution of Civil Engineers* (1) a Divisional Court, consisting of Field and Manisty JJ., were called upon to decide whether the Institution was a society instituted exclusively for the "purposes of science, literature, or the fine arts" within the meaning of s. 1 of the Act 6 & 7 Vict. c. 36, and so fulfilling one of the conditions of exemption from rateability. Field J., after stating what was the meaning of the word "science" in the section, described the question for determination to be whether the advancement and acquisition of science taken generally was the main and substantial object of the association. If so, he said, then the necessary concomitant advantage and enjoyment to the individual does not destroy the exemption. The Court came to the conclusion that in the case of the Institution the advantage and enjoyment conferred upon the individual members was not merely "concomitant," but was the primary or at any rate a distinct object, and accordingly held that the Institution was not exempt from rateability. This conclusion I shall have to consider later. For the moment I am merely concerned with the meaning that was given to the word "exclusively," a word, of course, that is synonymous with "solely" or "only." It is clear that some such meaning must be attributed to these words. Where a society is instituted for a charitable purpose, it is obvious that the membership of the society may confer upon its holder personal advantages of considerable value to him in his profession or in his social standing. He may, for instance, have an exclusive right to affix to his name a certain designation, and will be known to the public as a person belonging to the society. He may have to observe disciplinary rules laid down with a view to ensuring that he does not bring discredit upon other members of the society. But in such cases, although the securing of such advantages to the members may in a sense be regarded as one of the objects of the society, such object is merely concomitant or incidental to the real object of the society; and if that real object be charitable, the society is established for charitable purposes only.

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(1) 5 Q. B. D. 48.

This was the view taken by Lord Watson in the later case of *Inland Revenue Commissioners* v. *Forrest* (1), a case in which the objects of the Institution were once more subjected to the scrutiny of the Courts. The question in that case was whether the property of the Institution came within the exemption contained in sub-s. 3 of s. 11 of the Customs and Inland Revenue Act, 1885, as being "property which, or the income or profits whereof, shall be legally appropriated and applied . . . . for the promotion of . . . . science." It was not therefore necessary to consider whether the Institution was one of which the income was applied solely for the promotion of science, although, as I read the case, the House of Lords decided that it was, as I shall point out later. But in the course of his speech Lord Watson had occasion to consider the meaning of the word "exclusively" in s. 1 of the Act of 1843. He said this (2): "Then it is not sufficient compliance with the plain language of the Act that a society be established chiefly for the purpose of promoting science, literature, or the fine arts. One or other of these must be its exclusive object; so that an institution which also contemplated some other, though altogether subsidiary object, could not claim the benefit of the exemption." Now this language in Lord Watson's speech was explained by A. L. Smith L.J. in the case of *Art Union of London* v. *Overseers of the Savoy*. (3) After quoting the passage he said: "I understand by this that, if the other object be an object distinct from and not

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(1) 15 App. Cas. 334.
(2) 15 App. Cas. 348.
(3) [1894] 2 Q. B. 609, 627.

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connected with the fine arts, then the society, even though that object be altogether subsidiary, has not as its exclusive object the promotion of the fine arts, but, if the other object be only a means to the one end, i.e., as in this case, a lottery whereby to draw money from the public for the promotion of the fine arts, then the society has a sole and exclusive object, and not another object subsidiary thereto." The emphasis here laid upon the difference between an object that, although subsidiary to the main object of a society, is nevertheless distinct from it, and an object that is merely a means to the end of carrying out the main object, was repeated when the case came before the House of Lords. (1) Lord Herschell said (2): "Whatever view may be taken of the means employed to accomplish this end, I see no reason to doubt that the Society was instituted for the purposes of the fine arts exclusively within the meaning of the statute," the statute being in that case s. 1 of the Act of 1843. Lord Macnaghten said that he agreed with the view that A. L. Smith L.J. had expressed, though he did not in terms refer to the particular view that I have cited. But a few lines earlier he had said this (3): "It has been held in several cases that where a contributor derives personal advantage from being a member of a society, the society, though formed for one of the purposes favoured by the Act, cannot be considered as formed for that purpose 'exclusively.' This mode of construction may be admissible when the society is not incorporated, and its purpose, consequently, is not defined by charter or statute. When, however, that is the case, it seems to confuse the purpose of the society with the object of individual members in joining it." This passage in Lord Macnaghten's speech not only throws light upon the meaning of the word "exclusively." It seems to indicate that he would have been of opinion that the Institution of Civil Engineers was established exclusively for the purposes mentioned in its charter. But this is not a matter of inference to be drawn from Lord Macnaghten's speech in the *Art*

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(1) [1896] A. C. 296. (2) [1896] A. C. 306.
(3) [1896] A. C. 313.

Union case. (1) It was, in my opinion, actually so decided by the House of Lords in *Forrest's* case (2), to which I have already referred for another purpose.

It is true, as I have already stated, that the word "exclusively" was not used in the Act that was being then considered. It is equally true that both Lord Watson and Lord Macnaghten, in distinguishing the case of *Reg.* v. *Institution of Civil Engineers* (3), did so on, amongst other grounds, that in the statute in question there, the word "exclusively" was employed. Lord Macnaghten, indeed, intimated that if the language of the Act of 1885 had been the same as that of the Act of 1843, the fact that the founders of the society were not insensible of the advantages which such an institution was likely to confer upon its members in their professional capacity would have been a formidable objection. But he did not have to consider, and did not consider in fact, the question whether such an objection would have been successful. In my opinion, however, it necessarily follows, from what he and Lord Watson did decide, that the word "exclusively" or "solely" would have made no difference. It had been argued for the appellants in that case that when the charter and the by-laws of the Institution were looked at, it appeared that the main, the primary, object of the Institution was to promote the interests of the profession of engineers, and not to increase scientific knowledge. For the purpose of dealing with this argument, Lord Watson considered in detail the charter and the by-laws, and, having done so, said this (4): "The mere fact that membership is confined to those who are actively engaged, and have attained some degree of eminence, in the profession, does not militate against the object of the institution being the advancement of engineering science; because they are really the only persons possessing the knowledge and practical experience requisite for the efficient promotion of that object"; and a little later (5): "I do not doubt that

(1) [1896] A. C. 296.
(2) 15 App. Cas. 334.
(3) 5 Q. B. D. 48.
(4) 15 App. Cas. 350.
(5) 15 App. Cas. 351.

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membership is accompanied with a certain amount of prestige which may prove to be of service to the member in his professional career; but I believe that the same result would attend membership of any society which effectively promoted a branch of science intimately connected with the profession or business in which the member was engaged." In conclusion he said (1): "I have accordingly come to the conclusion that the income of the institution is, in fact, applied, not for the professional ends of individuals, but for 'the promotion of science' in the proper sense of the words; and in that view, I entertain no doubt that such income is 'legally appropriated' within the meaning of the Act, because the purposes to which it is applied are the same with those prescribed by the charter of incorporation." Lord Macnaghten said (2): "The question at issue may be stated shortly. Is the property of the Institution of Civil Engineers legally appropriated and applied for the promotion of the science of civil engineering, or is it legally appropriated and applied for the benefit of civil engineers in order to enable them to practise their profession to greater advantage? It cannot I think be doubted that the institution has raised the standard of the profession, and that to a civil engineer it is of advantage and probably of pecuniary advantage to be a member. But is that result the purpose of the society, or is it an incidental, though an important and perhaps a necessary consequence of the way in which the institution does its work in the pursuit of science?" It is quite clear, looking at the rest of Lord Macnaghten's speech, that in his opinion the result he referred to was not the purpose of the society, but was merely an incidental consequence such as he had described.

But if the advantage to the members is not the purpose of the society, but merely an incidental consequence of the way in which it promotes science, then it seems to me that the society was established for "the promotion of science" only, unless I have misunderstood the meaning of the word "only" as used in s. 37 of the Income Tax Act. It is moreover to be observed, as pointed out by Lord Halsbury

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(1) 15 App. Cas. 352. (2) 15 App. Cas. 354.

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in his dissenting judgment, that the omission of the word "exclusively" from the Act of 1885 means nothing. If part of the property or income of the society was legally appropriated or used for a purpose other than the promotion of science, then it was impossible to say that the society came within the exemption granted by s. 11 of the Act of 1885. "The property" and "the income and profits" in that section must mean the whole property and the whole of the income and profits. As the society was held to be entitled to the exemption, it must therefore have been because the majority of the House considered that the property and income and profits of the society were solely appropriated and applied for the promotion of science.

In my opinion Hawkins J. was justified in saying, as he did in the *Royal College of Music* case (1), that the effect of the judgment in the *Forrest* case (2) was virtually to overrule the judgment of Field and Manisty JJ. As regards that judgment, Lord Macnaghten, while agreeing in the conclusion, said that he had some difficulty in accepting the propositions and following the reasoning on which the conclusion was based. The conclusion was that the Institution was not entitled to exemption under the Act of 1843; and I think that Lord Macnaghten meant no more than that the conclusion could be supported on the ground that the Institution was not supported in whole or in part by "voluntary" contributions.

That the promotion of science is a charitable object is not disputed; and I accordingly arrive at the conclusion that the Institution is a body of persons established for charitable purposes only.

It was argued before us that the question whether the society was or was not such a body of persons was a question of fact; and that this question had been decided by the Commissioners in favour of the Crown. It is, however, a question that involves the ascertaining of the proper construction to be placed upon the charter and by-laws of the society; and is, therefore, a question of law, or at any

(1) [1898] 1 Q. B. 304, 313. (2) 15 App. Cas. 334.

rate a mixed question of law and fact. Nothing that has been effected by the charter of 1922 has any bearing upon that question of construction, and I have no reason to suppose that the existing by-laws are different in any material respect from what they were when the House of Lords gave its decision. The proper construction to be placed upon the society's charters and by-laws must, therefore, be taken to be the one that was adopted by the House of Lords in *Forrest's* case (1), and is one that the Commissioners, in my opinion, were bound to follow.

For these reasons, I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Hargrove & Co.; Solicitor of Inland Revenue.*

(1) 15 App. Cas. 334.

H. C. G.

GEE *v.* HAZLETON AND OTHERS.

1931
June 22, 23.

Landlord and Tenant—Rent Restriction—Dwelling-house and Land—Licence by Tenant to Company to erect Advertisement Hoarding on Part of Land—Notice by Landlord to quit that Part—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2 (*ii.*) (*iii.*).

The statutory tenant of a dwelling-house and land granted a licence for seven years at an annual rent to a bill-posting company to erect an advertisement hoarding on part of the land. The company was granted free and uninterrupted access to "the advertising position" for bill-posting, etc., purposes:—

Held, that although this did not constitute the grant of a sub-lease, but of a licence only, the said part of the tenant's premises had ceased to be within the protection of the Rent Restriction Act because used for business purposes by one other than the statutory tenant of the whole,, and that the landlord was entitled to possession of that part.

APPEAL from Bromley County Court.

The defendant, the respondent, Mrs. Hazleton, a widow, was the tenant of a dwelling-house and land, of which the plaintiff, the appellant, was landlord, known as New Farm, 46 Croydon Road, Beckenham, which she had occupied as statutory tenant for some years. The landlord's claim was to a strip of the land fronting on the Croydon Road, the position and area of which, as denoted on a plan, were agreed by the parties, and due notice to quit this portion had been given by the plaintiff. The defendant refused to give up possession on the ground that she was protected by the provisions of the Rent Restriction Acts.

By an agreement made on December 5, 1928, between the defendant and the Borough Billposting Company, London, the other defendants (who were not represented), it was agreed that the defendant (called therein the "licensor") should grant and the company (called therein the "licensee") should take "the exclusive right of posting, painting, or affixing and maintaining advertisements, either by enamel plates, boards, signs or posters, etc., upon the of the licensor situate and known as in the county of upon the terms and conditions following, namely," then followed

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the measurements. The above blanks were not filled in. The agreement was for seven years from April 1, 1929, at a rent of 14*l.* per annum, the agreement being terminable at the end of that period by either party giving six months' notice. The agreement proceeded: "The said Borough Billposting Company and agents or assigns to have at all times free and uninterrupted access to the, [*sic*] and user of the said advertising position for the above purposes." By another agreement between the same parties dated December 12, 1929, similar rights were granted and obligations imposed over a further extended frontage on the same road, the rent being 41*l.* 10*s.*, plus rates.

The county court judge held that the above agreements did not constitute a sub-tenancy, but were a mere licence, and that consequently the Rent Restriction Act still applied, and gave judgment for the defendant.

The plaintiff appealed. The appeal was heard before Scrutton, Greer and Slesser L.JJ. sitting as additional judges of the King's Bench Division.

A. T. Denning for the plaintiff. The county court judge was wrong in holding that as there had not been a letting to the bill-posting company, but the grant of a licence only, the Rent Restriction Act still applied to protect the portion of the premises claimed by the landlord. As the Act applies in rem and not in personam the status of the premises is to be determined by its user at the time of the claim for possession: *Gidden* v. *Mills.* (1) The portion let is no longer part of the dwelling-house, for the defendant has altered the status of that part by her own act: per Greer L.J. in *Haskins* v. *Lewis.* (2) It is true that the defendant only granted a licence and not a tenancy to the company, but that is not conclusive of the matter; it is the user which must be looked to. If the defendant had herself used this portion of the premises for bill-posting she would have been within the protection of s. 12, sub-s. 2 (ii.), of the Act, but if she had let it for business purposes to some one else she would not be protected as to that portion, because prima facie the landlord can claim the whole of the premises, the tenant being only protected so far as she can plead the Act. It makes no difference that the tenant has not let this portion, in that she has granted the effective user of it to another. There is here a separate occupation by the bill-posting company, for they have the right to use the land to the exclusion of everybody else from using it in the same way. It is not necessary to establish the relation of landlord and tenant for this purpose. The bill-posting company are in rateable occupation, for their occupation is paramount: *Holywell Union* v. *Halkyn Drainage Co.* (1)

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(1) [1925] 2 K. B. 713, 727.

(2) [1931] 2 K. B. 1, 15.

As to the metes and bounds of the portion claimed it is for the defendant to define them, because, the plaintiff prima facie being entitled to the whole of the premises, it is for the defendant to show in respect of what portion thereof she is protected by the Act. The tenant called no evidence on that point, but a plan was used by both parties at the hearing below.

D. M. Rosenberg (*B. H. Waddy* with him) for the defendant. Prima facie the whole of the premises is within the protection of the Act—see s. 12, sub-s. 2 (iii.)—and s. 12, sub-s. 2 (ii.), says that the application of the Act shall not be excluded by reason only that part of the premises is used for business purposes. By s. 15 the tenant is entitled to the benefit of all the terms and conditions of his original contract of tenancy " so long as he retains possession." This the tenant has done, for she has retained possession of every part of the portion in question, except the holes occupied by the posts of the advertisement hoarding, and a tenant " cannot be said to part with the possession of any part of the premises unless his agreement with his licensee wholly ousts him from the legal possession of that part ": per Farwell J. in *Stening* v. *Abrahams*. (2)

[*Provincial Bill Posting Co.* v. *Low Moor Iron Co.* (3) and *Hurst* v. *Picture Theatres, Ld.* (4) were also referred to.]

(1) [1895] A. C. 117, 124.
(2) [1931] 1 Ch. 470, 473.
(3) [1909] 2 K. B. 344.
(4) [1915] 1 K. B. 1.

The bill-posting company had not exclusive possession, and it is difficult to see how to define the portion of the defendant's premises in respect of which the Court can make an order.

Denning in reply referred to *Skinner* v. *Geary* (1) and to the passage in Foà on Landlord and Tenant, 6th ed., p. 323, quoted with approval by Scrutton L.J. in *Chaplin* v. *Smith.* (2)

SCRUTTON L.J. In this case, as in many rent restriction cases, there is a rather troublesome question, but I think, as I understand the facts, that there is not much difficulty in answering it. The tenant, the defendant, has a house, 46 Croydon Road, with a considerable quantity of land, and pays the plaintiff, the landlord, a rental of a little over 40*l.*, and she is receiving over 50*l.* for allowing an advertising contractor to erect very large hoardings on a portion of the land. If this plot is subtracted she still has a large quantity of land for a dwelling-house. The landlord has taken the view that she is using the plot of land on which the hoarding stands for a business other than her own, and therefore has put that plot of land outside the protection of the Rent Restriction Act. The tenant disputed this on the ground that she had not given a lease of that plot of land, but only a licence over it. The learned county court judge has accepted that view, and has said that, as this is a licence and not a tenancy, the land is still within the protection of the Rent Restriction Act, and the tenant may go on paying the landlord the rent, keeping her dwelling-house for her own use and receiving more than the rent she pays to the landlord for the use she allows to be made of this plot of land. This case in my view does not raise the general question of advertising boards and stations, because that may vary very much according to the particular facts. Boards put on the wall of a house may raise a question very different from that raised where boards have been erected on part of a garden, which is either used for nothing else or only used for purposes very unimportant compared with its use by the advertising boards. The difficulty with the Rent Restriction Act was for a long time that neither Parliament nor the Courts were clear whether the Rent Restriction Acts were intended to give a property to the tenant, which he could transfer to other people, or whether—and this I think is the view now well established—they confer a personal privilege only on the tenant occupying the dwelling-house. Some things have been clearly decided. Since the case of *Epsom Grand Stand Association* v. *Clarke* (1) was decided—I was a member of that Court, and I doubt whether that Court in the early stages of the Rent Restriction Acts appreciated fully what it was doing—it has been established that so long as the tenant dwells in the dwelling-house, it will not be taken out of the Act because he uses part of the dwelling-house for his own business. It has been established that if the tenant dwelling in the dwelling-house lets part of it furnished, that part is taken out of the protection of the Act. It has been established that if the tenant ceases to live in the dwelling-house at all, though he is letting it to members of his family, again it is taken out of the Act. It has been established that if the tenant lets the dwelling-house to another person for business purposes, that part is taken out of the Act.

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(1) [1931] W. N. 121.

(2) [1926] 1 K. B. 198, 211.

The facts here are as follows. The tenant has made two very odd agreements; I have my suspicion whether they were intentionally made odd in order to avoid any difficulties under the Rent Restriction Act. One of them, dated December 5, 1928, was a contract by which the tenant, called the licensor, agreed to grant, and the licensee to take, "the exclusive right of posting, painting, or affixing and maintaining advertisements . . . . by enamel plates, boards, signs or posters, etc., upon the   of the licensor situate and known as   in the county of   upon the terms and conditions following." The agreement is to remain in force for a term of seven years, but: "The licensees shall be at liberty at any time during the term of this agreement, or within twenty-one days of the termination thereof to remove all fixtures . . . . belonging to them." The agreement refers to the "said advertising position."

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(1) [1919] W. N. 170; 35 Times L. R. 525.

There has not been any advertising position defined at all. The next agreement, dated December 12, 1929, is somewhat more definite. It takes the exclusive right of posting upon vacant land frontage of the licensor "situate and known as 90 ft. additional frontage Croydon Road." Nothing was known as 90 ft. additional frontage Croydon Road, and nothing whatever is said of the depth to which the land goes back from the frontage.

Those two agreements clearly give the advertising company an irrevocable licence to erect advertising boards, position undefined, and to maintain them for seven years, and at any time to bring the advertising company's workmen over the soil in order to re-post bills and repair or re-erect the structure. It seems to me quite clear on those facts that the tenant has given another person an irrevocable licence to occupy and use some of the land—I will say presently what I think about how much—for the purposes of a business not that of the tenant, and it would seem to me fairly clear that that was never a use which the tenant was entitled to make of land within the Rent Restriction Act, and which at the same time should keep it within the purview of that Act. I wish to mention that I have the gravest doubt whether if s. 12, sub-s. 2, proviso (iii.), of the Act of 1920 had been investigated in the court below, it would not have been found that this land was taken out of the benefit of the Rent Restriction Act by the provisions therein about rateable value. As the point was not raised in the court below I only mention it to show that I have not overlooked it, and of course I do not rest my judgment on that ground.

The learned county court judge seems to have taken the view that the tenant has done nothing material in granting a licence and not a tenancy, because she has reserved some amount of possession to herself, and a very vague reference was made to a quantity of cabbages which were said to be growing somewhere under the shelter of the large advertising board. I think the learned judge, in deciding that as it was only a licence and not a sub-tenancy the tenant was not deprived of the protection of the Rent Restriction Act, was going back into what I may call the *Wood* v. *Leadbitter* (1) days of the views taken of a licence. When one gets some one with an irrevocable licence involving his occupation of parts of land, the use of that land under the licence is as much relieved from the control of the tenant as if there was an agreement of sub-tenancy. There have been controversies in rent restriction cases, whether one is to look at the agreement under which the land is used or to look at the actual user of the land. When the agreement and the actual user differ, which is to be treated as the more important ? I think that the authorities show that one must look at the actual agreement rather than at the actual user, but here the actual agreement and the actual user are the same. The tenant has granted permission to use this land for the purpose of somebody else's business, taking a reward for it, and the user is the same. Some of the authorities speak of paramount use. I can conceive in some advertising cases, cases of advertising boards, that different views may be taken when the advertising station consists of a board put on a dwelling-house. There the paramount use of the wall is as the wall of the dwelling-house ; and there is also a difficulty in defining what one gets possession of when the possession granted is that of an advertising station attached to a wall. Here there is no difficulty of that sort. The part in respect of which the licence is given has nothing to do with the dwelling-house, being a small part of a large garden round the dwelling-house. I have no doubt on these facts that the paramount use of the land is for the business of advertising, and that the growing of cabbages, the number of which and the space occupied by which the tenant did not take the slightest trouble to prove, constitutes a very minor use of the land as compared with its occupation by the huge advertising board for which the tenant is getting 50*l.* a year.

In my view, therefore, the learned county court judge was wrong in law when he took the view that when it was shown it was the subject-matter of a licence and not of a tenancy, the property still remained within the Act. In my view once it is shown that the paramount use, under an agreement, of part of the land, previously under the protection of the Rent Restriction Act, is for the purpose of the business of a person other than a tenant, that land is put out of the Act. Therefore, I think the learned county court judge came to a wrong conclusion.

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(1) (1845) 13 M. & W. 838.

The only remaining question is how much of the land is to go out of the Act? The parties seem to have understood what they were letting, and at the trial evidence was produced by the plaintiff by a plan showing the amount of land necessary to maintain and deal with this hoarding, and the plan was produced to us and we were told that it was agreed; at any rate the tenant never took the slightest trouble to prove anything contrary to it. If she had cabbages of value, she gave no evidence where they grew, and what land they occupied; she was content to leave it to the plan and the figures, and I think this Court will be doing ample justice therefore if it makes an order declaring that the land marked on the plan is now outside the province of the Rent Restriction Act and possession must be given of it to the landlord. I desire to say that I am perfectly satisfied that the Rent Restriction Acts were never intended to enable a tenant to make profit out of land having so little to do with his dwelling-house. That is going back to the theory of property and departing from the theory now established of personal right to go on living in a dwelling-house. The tenant's dwelling-house is unaffected; the tenant's pocket will be affected. The appeal, therefore, must be allowed with costs and the order I have indicated made.

GREER L.J. I come to the same conclusion. The questions we have to determine in this case, like almost all the questions that depend upon the interpretation of sections of the Rent Restriction Acts and their application to proved facts, are not without difficulty. The facts of the case, so far as they are proved by uncontradicted evidence, are as follows. By two agreements made in December, 1928 and 1929, the premises, to use a neutral term, were dealt with in such a way as to give to a bill-posting company an absolute right of user of the land defined on the plan that was produced. The first agreement is dated December 5, 1928, and it gives, so far as it can give, the right of user thereof for seven years and thereafter if not determined by a six months' notice. The rights are described in clause 4 of the agreement in these terms: "The said Borough Bill Posting Company and agents or assigns to have at all times free and uninterrupted access to the, and user of the said advertising position for the above purposes. Should the advertising position become obscured, or where (if necessary) way-leave or access is not granted, this agreement to become void at once." In strictness that is not a lease of the land, but is a lease of rights over the land, that is to say, the free and uninterrupted access to the advertising position and the free and uninterrupted user of the advertising position for the purpose of posting bills. The other agreement, which relates to an additional portion of the land in respect of which rights were granted by the tenant to the bill-posting company, again refers to that which is granted as at all times free and uninterrupted access to and user of the said advertising position for the above purposes. In order to carry out such an agreement it would be necessary that the land should remain in such a state that the bill-posting company could at all times have free and uninterrupted access to and user of the advertising position, whatever that may mean. When the case came on for trial a plan was produced and put in by the plaintiff who was claiming possession, with the statement, which was accepted by the defendant's representatives, that the land bounded by a pink line on the plan, was land in respect of which the bill-posting company had the right to free and uninterrupted access and free and uninterrupted user. There was some evidence that some cabbages or other plants belonging to the tenant, the defendant, were on a part of this land, but of course the

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existence of those vegetables was subject to the right of the bill-posting company to the free and uninterrupted user of the bill-posting position. I regard the case as depending upon the uncontradicted evidence that the land outlined by the pink line on the plan was the bill-posting position to which the action had reference and over which the rights were granted by the agreement. On those facts we have to consider the application of s. 12, sub-s. 2, of the Rent Restriction Act, 1920, subject to the fact that at the time we are considering, the Act had ceased to apply to premises used for business, trade or professional purposes, except as mentioned in s. 12, sub-s. 2 (ii.), of the Act. It is to be observed that when by s. 13, sub-s. 1, the Act was applied to business premises, the words which were used to apply the Act to business premises were not " let as business premises " but " used for business trade or professional purposes." When s. 13, sub-s. 3, says that " This section shall continue in force until June 24, 1921," the Act meant that it should not continue in force as regards business premises beyond that date, and it is just as if the Act had said that after that date the Act should not apply to any premises used for business, trade or professional purposes except as provided by s. 12, sub-s. 2. That section provides that the Act applies to a house as defined by the standard rent where either the annual amount of the standard rent or the rateable value does not exceed certain figures, and it is submitted that this house comes within that general clause notwithstanding the fact that it includes a great deal of land which possibly might have a value largely in excess of the value of the house. The case was conducted entirely upon the basis that the house was a house which together with its garden was within the provisions of the Rent Restriction Act. Then the sub-section goes on to provide that, although it applies to those premises, there are to be certain exceptions which are covered by provisoes. The first proviso is that this Act shall not apply, save as expressly provided, to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance or use of furniture. On that sub-section it was long ago decided in *Prout* v. *Hunter* (1) that its operation is not confined to a house which is let by the landlord who is seeking possession at a rent which includes payment for board, attendance or use of furniture, but the proviso includes and takes out of the Act a house which the tenant has sub-let for a rent which includes payment in respect of board, attendance or the use of furniture. Sub-cl. (ii.) of the proviso goes on to say: "The application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes." It is clear I think that the object of that sub-section was to enact that a person who occupied a dwelling-house was not to be excluded from the benefit of the Act by reason of the fact that the person had himself or herself, as the case may be, used a portion of the dwelling-house for the purpose of his or her trade or professional purposes. There are in existence many small shops which are part of a dwelling-house, but used for business purposes. That section was intended to protect those tenants from being excluded from the premises. Then sub-cl. (iii.) is this: "For the purposes of this Act, any land or premises let together with a house shall, if the rateable value of the land or premises let separately would be less than one quarter of the rateable value of the house, be treated as part of the house, but, subject to this provision, this Act shall not apply to a house let together with land other than the site of the house." The case was conducted upon the basis that this house came within the first part of that proviso, and therefore if the lady who was the tenant of the premises had herself been a bill-poster and had erected a bill-poster hoarding and done a bill-postering business on the corner of her land, it would have been difficult to say that that portion of the land was taken out of the Act. But that is not what she did; she let what I think we are entitled to describe as the user of a defined portion of the premises to the bill-posting company. Reading proviso (ii.) to s. 12, sub-s. 2, and also s. 13, one cannot help seeing that the proviso and the section are directed not so much to the terms of a lease, but to the user of the premises either for the purpose of a dwelling-house or for the purpose of business or professional purposes. It has been held in *Phillips* v. *Hallahan* (1) that if the portion of the premises is separately let for business premises to some one other than the tenant, that part is taken out of the Act. The question is, should the same answer be given if the land in question is not sub-let to a tenant who occupies as a tenant in the strict sense of the word, but is the subject of an exclusive licence for business uses? Should there be the same answer as where there is an actual sub-tenancy of a defined portion of the land? It seems to me that the answer ought to be the same, and in my judgment that is the result of holding, as I think it has been held, that the decision of the judges who decided *Gidden* v. *Mills* (2) was correct. In that case there was a dwelling-house and a garage. The dwelling-house was sub-let but the garage was retained by the tenant to use for business purposes. It was there held that, because he was using the garage for business purposes himself, not having let it to anybody else, he had lost the protection of the Act so far as the garage was concerned, and as he had parted with the possession of the rest of the land let to him, he was not a tenant of it or an occupier having any rights under the Act at all. There has been a difference of opinion whether the proper order which should have been made in that case was an order for judgment for possession of the garage or whether there should not have been an order for judgment for possession of the whole of the premises let. My view was, when I decided that case, that for the reasons expressed the judgment ought to be for possession only of the land which was being used for business premises, that is to say, the garage; but that view did not commend itself to the majority of the Court of Appeal who decided *Haskins* v. *Lewis*. (3) I think it must now be taken that the order in

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(1) [1924] 2 K. B. 736.

(1) [1925] 1 K. B. 756.

(2) [1925] 2 K. B. 713.

(3) [1931] 2 K. B. 1.

Gidden v. *Mills* (1) was wrong in one respect and in one respect only—namely, in that where the tenant had parted with the dwelling-house to a sub-tenant and was himself using the rest of the premises for business purposes, judgment ought to have been for possession of the whole of the premises let and not for possession of part of the premises. That view has no bearing on the case which we have to consider now, because in the present case the tenant did retain the dwelling-house and did retain everything but the bill-posting station which was used by the bill-posting company. I see no reason to hold that there cannot be a judgment for part of the premises as to which it is proved that the exclusive right of user has been granted to a third person. In this case we are not concerned with the position of a tenant who is herself out of occupation of the dwelling-house and using part of the premises for business purposes, but it seems involved in *Gidden* v. *Mills* (1), apart from the question of the right order, that user of a portion of the premises exclusively reserved for business premises may take that part, which is to be a defined part, out of the Act altogether, and if it be taken out of the protection of the Act, then the landlord, who has given notice to quit, and at common law would be entitled to possession of the whole premises, can say: "At common law I would be entitled to possession of the whole; you, the defendant, have shown a right to remain in possession of a portion of the premises, but you have shown no right to remain in possession of that portion of the premises of which I seek to recover possession." Though the question involved in this appeal is not without difficulty, I have come to the conclusion that the right order is, that the appeal should be allowed with costs, and that there should be judgment for the plaintiff for possession.

SLESSER L.J. I agree with the views expressed by my Lords. The tests under s. 12 of the Act of 1920 are inferential, but that section and the guidance given by the lapsed s. 13 of the Act point to user as the criterion in considering

(1) [1925] 2 K. B. 713.

whether what the tenant has done has thrown the whole or part of the house out of the protection of the Act. The difficulty which arises in cases like this is really one of fact and degree. Where the sub-tenancy is proved, it is much easier to find on the facts whether the part so demised has or has not been used for business purposes, but when one is dealing with user, the user, on the one hand, may be a user substantially giving occupation and dominant or paramount user to a person other than the tenant, or the user by the person other than the tenant may be of so slight a character as scarcely to exclude the land from the protection of the Act; or one may get a concurrent user both by the tenant and by the grantee of the licence from the tenant. In any event I am quite clear that the learned judge here was wrong in disposing of the matter on the ground that the tenant had granted a licence and not a sub-tenancy. While I think much may turn in an individual case on the nature of the user—a view which has been indicated by my Lord when he drew attention to the difference between what might properly be called an advertising station, a physical erection on a defined piece of land, and the user of a wall for the purpose of advertising—I am clear that in this case the user contemplated by the agreements was of such a kind that it did constitute the user of that part of the house—as it is notionally to be considered under s. 12, sub-s. 2 (iii.), being together with the house assumed to be part of the house—a user by a person other than the tenant for business purposes. In *Stening* v. *Abrahams* (1), a case of a licence to put up an advertisement, Farwell J. says on the question whether the tenant, the grantor, had or had not parted with possession: "The fact that the agreement is in form a licence is immaterial, as a licence may give the licensee so exclusive a right to the legal possession as to amount to a parting with possession." Again in the case of *Taylor, Garnett, Evans & Co.* v. *Pendleton Overseers* (2) Wills J. said: "The words used there were more like words intended to confer a licence only than those used in the present case. I think the word

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(1) [1931] 1 Ch. 470, 474.

(2) (1887) 19 Q. B. D. 288, 294.

'privilege,' which is used in this agreement, is not inconsistent with the right to occupy. I have come to the conclusion that on the proper construction this agreement also creates a tenancy. For these reasons I am of opinion that both the hoardings are rateable." Here we are not concerned with rating, nor specifically with occupation, but with user. Those observations point to the fact that the granting of a licence is not in itself, because of the form of the licence, conclusive whether a complete right of user or even a right of occupation has or has not passed under the licence. I need not refer in detail to these agreements. They give an exclusive right of fixing advertisements upon the vacant land frontage of the licensor. The phrase "vacant frontage" seems to indicate that the tenant was not putting this land to any use, but the agreement is not very artistically drawn. We have heard some suggestion that cabbages were grown on this land; whether they were grown or whether they were derelict cabbages I know not, but looking at the fair construction of these agreements, I think the land being described as vacant land, the licensees were entitled to free and uninterrupted access to and user of the position, and we may fairly come to the conclusion that what was intended was to grant to the licensees at any rate paramount user of this land, and I think substantially an occupation, certainly an occupation of those parts which were necessary in order to erect the advertising hoarding. If that be so, there is here a part of the house, the land used and allowed to be used by the tenant for business purposes other than those of the tenant, and I agree that in those circumstances the land, on that licence being granted, passed outside the ambit of the Rent Restriction Acts, and therefore, I think that this appeal should be allowed.

Appeal allowed.

Solicitor for plaintiff: *Herbert A. Phillips.*
Solicitors for defendant: *Evans, Jarvis & Sherry.*

W. L. L. B.

C. A.
1931
May 7.

WILKINSON (REVENUE OFFICER FOR THE TAUNTON ASSESSMENT AREA) *v.* SIBLEY AND ANOTHER (OCCUPIERS).

Rates and Rating—Derating—Industrial Hereditament—Outfitters and Bespoke Tailors—Hereditament consisting of Workshop, Office, and Retail Shop—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3, *sub-s.* 1.

By s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, "The expression 'industrial hereditament' means a hereditament (not being a freight transport hereditament) occupied and used as a mine or mineral railway or, subject as hereinafter provided, as a factory or workshop: provided that the expression 'industrial hereditament' does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say—. . . . (*b*) the purposes of a retail shop . . . . (*f*) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

Occupiers of a hereditament carried on business both as outfitters and as bespoke tailors. The hereditament consisted of a workshop, an office, and a retail shop in which the occupiers sold articles made in the workshop. It was mainly used as a workshop but partly also as a retail shop:—

Held, that the hereditament was used for the purposes of a retail shop, within the meaning of sub-s. 1 (*b*) of s. 3, and was therefore not an industrial hereditament within the meaning of the sub-section.

Finn v. *Kerslake* [1931] A. C. 446, 457, 485, explained and followed.

APPEAL from the decision of a Divisional Court upon a special case stated under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, by the Chairman of Quarter Sessions for Somerset holden at Taunton at the instance of the Revenue Officer for the Taunton Assessment Area, who appealed against the decision of the Taunton Assessment Committee, including in the special list for the Rating Area of the borough of Taunton the hereditament described as follows:—

Occupiers, Messrs. Sibley & Donovan; premises, shop, workrooms, etc., Cheapside; assessment No. 185; net annual value 205*l.*; 59*l.* for industrial purposes; 146*l.* for non-industrial purposes.

2. The following facts were admitted or proved:—

A. The hereditament, which is situated in one of the principal streets in the shopping centre of Taunton, consists of a three-storeyed building known as 4 and 5 Cheapside, Taunton, and is in the sole occupation of Messrs. Sibley & Donovan, who are bespoke tailors and outfitters.

B. The Occupiers commenced business at No. 5 Cheapside in 1911, and until December, 1927, they carried on at No. 5 only the manufacture and sale of men's shirts, breeches and overcoats which were ordered by customers on the premises and elsewhere. They never carried on the business of ready-made tailoring at No. 5.

C. In December, 1927, the Occupiers purchased the premises known as No. 4 Cheapside because they had insufficient room for the tailoring business, and having done so they opened on the ground floor of No. 4 a shop in which they sold shirts, collars, socks, hats, ties and other similar articles not made on the premises. The upper floors of Nos. 4 and 5 are occupied and used as appears hereafter.

D. The hereditament is occupied and used as follows :—

(i.) Two front shops now turned into one on the ground floor with a total frontage of 35 feet to the main thoroughfare and an average depth of 32 feet to a wide street. The shops comprise two show windows, one showing cloth and the other general outfitting, hats, ties, umbrellas, etc. The ground floor of No. 5 is used for interviewing customers, showing materials and storing the cloth from which suits are made. The ground floor of No. 4 is used entirely for the outfitting business.

(ii.) First floor: (*a*) two fitting rooms; (*b*) office; (*c*) cutting room used for the cutting out of cloth for making suits, breeches and overcoats, and for cutting trimmings; (*d*) a small store room in connection with the outfitting business.

(iii.) Second floor: (*a*) and (*b*) two work-rooms each 11 feet 6 inches by 9 feet used for making and ironing garments; (*c*) and (*d*) two work-rooms, each 12 feet by 9 feet; (*e*) one work-room, 14 feet by 8 feet. The three rooms last mentioned were not in use at the date of the hearing at the Quarter Sessions. The last mentioned room is used at times as a store for wrappings and collapsible cardboard boxes and for packing garments made on the hereditament; (*f*) one workroom, 12 feet by 7 feet 6 inches, used for making garments.

(iv.) Third floor: five work-rooms (*a*) and (*b*) each 11 feet 6 inches square; (*c*) 12 feet by 7 feet 6 inches; (*d*) 12 feet by 9 feet; (*e*) 14 feet 6 inches by 8 feet. Of these four are used for making garments and one as a room for storing patterns used by the cutters; (*f*) one stock room, 11 feet 6 inches by 9 feet, used as a repository for waste cloth cuttings.

(v.) Basement: two cellars.

E. The hereditament is occupied and used as described in paragraph 2 D solely in connection with the Occupiers' business of bespoke tailors and outfitters. The only parts used for the purposes of the outfitting business are the ground floor of No. 4 and the room (*d*) on the first floor.

F. The number of persons employed in the hereditament is twenty-nine in addition to the two principals. Of these twenty-six are engaged in tailoring and three in the outfitting department. The two principals are solely engaged in tailoring.

G. In 1928 wages paid to employees engaged in making garments amounted to 2457*l.*, and to those engaged in the outfitting department to 452*l.* In 1929 the wages so paid were 2390*l.* and 474*l.* respectively.

H. In 1928 of the gross turnover 77.2 per cent. was in the tailoring department and 22.8 per cent. in the outfitting department. The outfitting department has not shown a profit. In 1929 of the gross turnover 76.6 per cent. was in the tailoring department and 23.4 per cent in the outfitting department.

J. Of the customers of the tailoring business 70 per cent. live outside Taunton, and of this 70 per cent. 30 per cent. live outside a radius of 20 miles. Of these customers some give their orders and are fitted on the premises at No. 5; others give their orders and are fitted at their own residences, and many repeat orders are received by post.

K. The hereditament is registered as a workshop under the Factory and Workshop Acts, 1901 to 1920.

3. The Revenue Officer contended :—

(*a*) That the hereditament is not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it is primarily occupied and used for one or more of the following purposes, that is to say (i.) the purposes of a retail shop ; (ii.) the purposes of a retail trade or business which are not the purposes of a factory or workshop ; (iii.) purposes incidental and ancillary to the purposes of a retail shop or retail trade or business which are not the purposes of a factory or workshop.

4. The Occupiers contended that the primary user and occupation of the hereditament is as a workshop for the manufacture of clothes and not for any of the purposes referred to in the proviso to s. 3, sub-s. 1, of the Act of 1928.

5. The Court of Quarter Sessions found, in so far as it was a question of fact, that the hereditament was a workshop within the meaning of the Factory and Workshop Acts, 1901 to 1920, and was occupied and used as such ; that it was occupied and used partly as a retail shop, but mainly as a workshop, where suits, breeches, and overcoats were cut, made up, and finished to order, and that the fact that a large proportion of the suits, breeches, and overcoats were sold on the hereditament did not deprive it of the benefit of the Rating and Valuation (Apportionment) Act, 1928, or render the primary user and occupation of it anything other than those of a workshop. The Court therefore decided that the hereditament was an industrial hereditament within the meaning of the Act and gave judgment for the Occupiers and ordered that the hereditament should remain in the special list.

6. The question for the opinion of the Court was whether upon the above facts the Quarter Sessions came to a correct determination and decision in point of law.

The Divisional Court (Lord Hewart C.J., and Avory and Macnaghten JJ.) affirmed the decision of the Quarter Sessions and dismissed the appeal.

The Revenue Officer appealed.

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WILKINSON, R. O. v. SIBLEY.

Sir William Jowitt A.-G., Wilfrid Lewis and *Colin H. Pearson* for the appellant.

J. D. Casswell for the respondents.

SCRUTTON L.J. This case raises the question whether a certain hereditament is an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928. The Divisional Court, following a decision of this Court and a decision of the majority of the Court of Session in *Inland Revenue* v. *Gunn, Collie & Topping* (1), held that the hereditament was an industrial hereditament. After the decision of the Divisional Court and before this appeal was heard, the House of Lords reversed the decision of this Court and gave a judgment upholding the dissenting judgment in the Court of Session as against that of the majority with which this Court had agreed. Mr. Casswell has argued that, in view of certain facts to which I will refer, the decision of the House of Lords does not govern this case.

The collocation in one hereditament of a factory where things are manufactured and a shop in which they are sold was first considered in the cases relating to bakeries. It must, I think, be taken as decided that if the bakery where the bread is made is in one hereditament and the shop in which the bread is sold is in another, the hereditament in which the bread is made, being a factory or workshop, may be derated. But a question arose when the bakery where the bread or confectionery was made and the shop in which the product of the bakery, or some of it, was sold were parts of the same hereditament. The language of the Act seems to indicate that one must first look to see whether the hereditament contains a factory or workshop; then whether the hereditament, if it contains a factory or workshop, is nevertheless primarily occupied and used for certain named purposes, of which one is the purpose of a retail shop. If it is so occupied and used it is not an industrial hereditament. In many of the special cases stated on appeals under this

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(1) 1930 S. C. 389.

Act a practice has been followed by which the parties to the appeal agree in stating the case under Baines' Act (1) instead of having it stated under s. 31 of the Rating and Valuation Act, 1925, by the tribunal whose decision is appealed from, and, as neither of the parties is ready to agree to a finding which would state that party out of Court, the case comes up to the Supreme Court with no finding of fact upon the question whether the hereditament is primarily occupied and used for any particular purpose. This is a source of great embarrassment to the Court. When *Finn* v. *Kerslake* (2) came before this Court there was no finding about the primary purpose of the hereditament, and we had to deal with the case as best we could with certain facts which were stated. This Court agreed with the majority of the Court of Session, and especially with the view expressed by Lord Sands in *Inland Revenue* v. *Assessor for Wigtownshire* (3), where he said: "The bakehouse is vital. The whole fabric, dwelling-house and retail shop, depend upon the bakehouse, and therefore I am unable to hold that, as in contrast with the baking of bread, either retail sale or residence is primary." We accordingly affirmed the decision, apportioning the rateable value as between the user for purpose of the bakehouse and user for the purpose of the shop. There was an appeal from this decision to the House of Lords. (4) The judgment is stated to be the judgment of the whole House. (5) Their Lordships took the view that a unified business carried on in one hereditament is not to be dissected. That must be a decision not of fact but of law. The judgment contains this passage (6): "I have no doubt, on the facts of this business, that the whole hereditament is used and occupied for the purposes of a retail baker's shop." "The bakehouse at the back of the shop, which makes the goods for the retail business, is an ordinary part of a retail baker's shop and, in my opinion, is merely ancillary to the trade or business carried on in the shop." No reference is made to the anomaly that if the bakehouse had been in another hereditament, it would have been derated as being a factory or workshop.

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(1) The Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 11.

(2) Sub nom. *Wimbledon R. O.* v. *Kerslake* [1931] 1 K. B. 421, 509.

(3) 1930 S. C. 543, 547.

(4) [1931] A. C. 446, 457, 485.

(5) [1931] A. C. 493.

(6) [1931] A. C. 487.

Now decisions of the House of Lords upon matters of fact are not binding upon the House or upon any other Court. Decisions of the House of Lords upon matters of law are binding upon the House itself, and, of course, upon any subordinate tribunal. I understand the House of Lords to have decided as matter of law that, when there is a workshop and a retail shop on the same hereditament constituting "a unified business," that business is not to be dissected. The case of a hereditament, consisting of a large factory, the occupier of which sends nearly all the goods to other shops to be sold, but sells a small portion in a small shop upon the hereditament itself, must be left to be decided when it arises. In the meantime the judgment of the House of Lords covers the present case. Here are two shops in a street in Taunton; one of them is an outfitting shop; adjoining it is a shop to which customers come to give orders for bespoke tailoring, and at which orders may also be given by post. The upper floors of this shop are occupied by the workmen who cut the goods according to order. The case finds as follows: "In so far as it was a question of fact for our decision, the hereditament . . . . was occupied and used partly as a retail shop but mainly as a workshop." I think it follows from the decision of the House of Lords that the business carried on in this hereditament cannot be dissected, and that the workshop must be treated as ancillary to the trade or business. The appeal must be allowed.

GREER L.J. I agree. In my opinion we are required by the decisions of the House of Lords in *Finn* v. *Kerslake* (1) and *Turpin* v. *Middlesbrough Assessment Committee* (2) to hold that this appeal must succeed.

In appeals to this Court, and from this Court to the House of Lords, after the decision of a judge of the High Court sitting alone, the appellate Court has power to reverse the

(1) [1931] A. C. 446, 457, 485.

(2) [1931] A. C. 446, 451, 470.

Court below on a question of fact; but on appeals which arise out of special cases stated, neither the High Court, nor the Court of Appeal, nor the House of Lords has jurisdiction to find the facts. If the facts are insufficiently found in the special case, whether the case comes before the Court under the Quarter Sessions Act, 1849, by agreement, or whether it is stated by a Recorder or Chairman of Quarter Sessions, the case must go back for further statement by the parties or by the tribunal which is by statute the tribunal to find the facts; the Superior Courts have no jurisdiction to find them. This has an important bearing on the interpretation of the judgments of the House of Lords in the two cases I have cited. They must be understood as judgments on questions of law. The one which more nearly resembles the present case is *Finn* v. *Kerslake* (1), which seems to me to have decided that upon the facts there stated no Court could, as matter of law, come to any conclusion other than that the hereditament in question was primarily occupied and used as a shop. If that is the conclusion as matter of law on the facts stated in *Finn* v. *Kerslake* (1) it is a fortiori the conclusion on the facts stated in the present case. The respondents occupy a shop in which they carry on two businesses, one the business of an outfitter, and the other the business of a bespoke tailor; but both these businesses are carried on in the one rateable hereditament. They use their shop for the purpose of their business as bespoke tailors and for selling retail all garments made on their premises; they also use it for selling their outfitting articles. In relation to the section of the Act to be applied to their case they are in the same position as the occupiers were in *Finn* v. *Kerslake*. (1) In one respect this case is stronger against the respondents, because in *Finn* v. *Kerslake* (1) a very large proportion of the loaves made on that part of the hereditament which was used for factory purposes was delivered from the factory side of the hereditament, if I may so describe it, and not from the shop at all. There is nothing resembling that in the present case. If the facts of this case are in all material respects the same as those in the cases decided by the House of Lords we are bound to follow the decisions of the House of Lords. For these reasons I agree that the appeal must be allowed.

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(1) [1931] A. C. 446, 457, 485.

SLESSER L.J. I agree. In order to appreciate the full effect of the decision of the House of Lords in *Finn* v. *Kerslake* (1) it is necessary to consider the history of former decisions upon the meaning of s. 3, where the hereditament in question consists of a factory or workshop on the one hand and a retail shop on the other, both being in the same hereditament. The first case upon this point was *Inland Revenue* v. *Gunn, Collie & Topping* (2), where the whole product of the workshop was disposed of through the medium of the retail shop; there it was held by a majority of the Court of Session that it was permissible to dissect the purpose of the hereditament, and to hold that the hereditament was not primarily occupied and used for the purpose of a retail shop, and therefore fell within the definition of an industrial hereditament in sub-s. 1. That view was approved by this Court in *Finn* v. *Kerslake.* (3) On appeal from that case the House of Lords (1) seem to me to have decided not only that this Court was wrong in law, but that the majority of the Court of Session was also wrong, and that Lord Hunter was right, and that the bakehouse and bakery in *Finn* v. *Kerslake* (1) ought to be treated as a retail shop. Lord Dunedin, who delivered the opinion of the House, said (4): "In the present case, the hereditament is all occupied and used for the one trade or business—namely, a retail trade or business in bread and confectionery. . . . . Similarly the bakehouse at the back of the shop . . . . is an ordinary part of a retail baker's shop and, in my opinion, is merely ancillary to the trade or business carried on in the shop. I have no doubt, on the facts of this business, that the whole hereditament is used and occupied for the purposes of a retail baker's shop." It is true that, as stated in paragraph J. of this special case, some of the customers give their orders and are fitted at their own residences, and repeat orders are received by post; but the earlier words indicate that these orders are given through the shop, and there is no finding that any of the product of this factory is used except for the purpose of supplying the shop or fulfilling orders which come through the shop.

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(1) [1931] A. C. 446, 457, 485.

(2) 1930 S. C. 389.

(3) Sub nom. *Wimbledon R. O.* v. *Kerslake* [1931] 1 K. B. 385, 421, 509.

(4) [1931] A. C. 487.

It has now been laid down by the House of Lords as matter of law that, where a hereditament consists of a factory and a retail shop, and the product of the factory is disposed of through the retail shop, the hereditament is occupied and used for the purpose of the retail shop. There is no question whether it is primarily used for the shop or for the factory. If there is what the House of Lords describe as "a unified business," it is not legitimate to dissect that unified business to ascertain which part of it is primary and which is secondary. That is pure matter of law. The facts in this case do not differ in any material respect from those in *Inland Revenue* v. *Gunn, Collie & Topping* (1) or those in *Finn* v. *Kerslake.* (2) In these circumstances we are bound by the decision of the House of Lords to hold that this hereditament is occupied and used for the purposes of a retail shop, and the appeal must be allowed.

Appeal allowed.

Solicitor for appellant: *The Treasury Solicitor.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for Alms & Young, Taunton.*

(1) 1930 S. C. 389.

(2) [1931] A. C. 446, 457, 485.

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TOOGOOD AND SONS, LIMITED (OCCUPIERS) *v.* GREEN (REVENUE OFFICER FOR SOUTHAMPTON COUNTY BOROUGH ASSESSMENT AREA).

LIPTON, LIMITED *v.* BURTON (REVENUE OFFICER FOR METROPOLITAN BOROUGH OF SHOREDITCH ASSESSMENT AREA). (1)

Rates and Rating—Derating—Industrial Hereditament—Hereditament consisting of Factory, Office and other Buildings—Preparation of Seed in Factory—Purchasers' Orders received in Office—Seeds dispatched from Factory—User for Purposes of Retail Shop—Special List—Apportionment.

Factory—Blending of Tea for Export—No Sale on Hereditament—Distributive Wholesale Business—No User for Purposes of—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3.

By s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, " The expression ' industrial hereditament ' means a hereditament (not being a freight-transport hereditament) occupied and used as a mine or mineral railway or, subject as hereinafter provided, as a factory or workshop : Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say— . . . . (*b*) the purposes of a retail shop ; (*c*) the purposes of distributive wholesale business ; . . . . (*f*) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

A hereditament consisted of Warehouses numbered 1 and 2, an office, and other buildings. The office and last mentioned buildings were not used for industrial purposes. Warehouse No. 1 was occupied and used for cleaning, testing, analysing and sorting seeds so as to fit them for sale. A small quantity of the seed when prepared was sold by the occupiers in a retail shop outside the hereditament. The rest was dispatched directly from Warehouse No. 1 to purchasers in pursuance of orders received at the office :—

Held, by Greer and Slesser L.JJ. (Scrutton L.J. dissenting), that the hereditament was occupied and used for the purposes of a retail shop within the meaning of the proviso to s. 3, sub-s. 1.

Pritchard v. *William Lewis and Sons* [1931] 1 K. B. 456, 502, must be considered as overruled by the joint effect of *Finn* v. *Kerslake* [1931] A. C. 446, 457, 485, and *Turpin* v. *Middlesbrough Assessment Committee* [1931] A. C. 446, 451, 470.

Per Greer L.J. : Where a factory is used for the purpose of adapting goods for sale by retail, and the business of the occupier consists of selling by retail and delivering from the hereditament the goods so adapted, then as matter of law the hereditament is primarily occupied and used for the purpose of a retail shop within the meaning of the proviso to s. 3, sub-s. 1.

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(1) These two cases were heard together.

A hereditament was occupied and used for blending, sifting, cutting, milling, and packing tea so as to make it suitable for export and wholesale distribution abroad as blended tea. There was no evidence of sale upon the hereditament:—

Held, by the Court that the hereditament was an industrial hereditament within the meaning of s. 3.

Sedgwick v. *Watney, Combe, Reid & Co.* [1931] A. C. 446, 447, 461, and *Barton* v. *R. Twining & Co.* [1931] 1 K. B. 386, 475, 500, followed.

TOOGOOD AND SONS, LIMITED (Occupiers) *v.* GREEN (Revenue Officer for Southampton County Borough Assessment Area).

Appeal from the decision of a Divisional Court upon a case stated by order of Lord Finlay J. under s. 11 of the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45).

1. The premises in question consist of a single hereditament situate at Blighmont Park, Milbrook, about two miles distant from Southampton, and are described in the valuation list as a seed warehouse, offices, canteen and outbuildings.

2. On July 29, 1929, the Occupiers and the Revenue Officer appeared before the Assessment Committee for the Southampton County Borough Assessment Area on the hearing of an objection by the Occupiers to the omission of the hereditament from the draft special list prepared by the rating authority and transmitted to the Assessment Committee pursuant to the provisions of the First Schedule to the Rating and Valuation (Apportionment) Act, 1928.

3. The Assessment Committee having heard and considered the objection determined that the hereditament was not an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, and ordered that it should be excluded from the special list.

4. The Occupiers, being aggrieved by this determination, on August 7, 1929, entered an appeal to the Court of Quarter Sessions for the county borough of Southampton by lodging a notice of appeal with the clerk to the said Court and serving a copy of the notice on the Revenue Officer.

5. The Occupiers and the Revenue Officer thereupon consented and agreed to state the facts of the case in the form of a special case for the opinion of the King's Bench Division, and obtained the order above referred to from Lord Finlay J.

6. In pursuance of the said order the parties to the appeal concurred in stating on the questions of law hereinafter set out the following facts.

7. [This paragraph consisted of mere repetition.]

8.—A. The Occupiers carry on the business of retail seedsmen at the aforesaid premises which are registered as a factory and workshop within the meaning of the Factory and Workshop Acts, 1901 to 1920. The rateable value is 1204*l.* Before the reassessment under the provisions of the Rating and Valuation Act, 1925, the hereditament, which comprises (*a*) an extensive modern warehouse, hereinafter called Warehouse No. 1, (*b*) a block of administrative offices, and (*c*) a small corrugated iron warehouse adjoining the block of administrative offices, was the subject of three separate assessments, Warehouse No. 1 being assessed in the sum of 710*l.*, the offices in the sum of 120*l.*, and the smaller offices in the sum of 16*l.* Under the Act of 1925 it was assessed as one hereditament.

B. If the hereditament is an industrial hereditament it is not occupied and used wholly for industrial purposes and the net annual value thereof should be shown in the special list as being apportioned between the occupation and user of the hereditament for industrial purposes and its occupation and user for other purposes.

C. The following is a description of the premises. Warehouse No. 1 consists of seven floors with an aggregate floor area of 66,971 square feet. The smaller warehouse comprises two floors with an aggregate floor area of 3588 square feet. The block of offices consists of two floors and a store room in the roof. The total floor area of this block is 8894 square feet. There is also a wooden hut with an aggregate floor area of 2400 square feet.

D. The nature of the user and occupation of the premises is as follows. The block of offices is used for the purpose of offices; the smaller warehouse is used for packeting seeds, and the wooden hut is used as a recreation room for the staff. It is conceded by the Occupiers that these buildings, comprising a floor area of 14,882 square feet, are occupied and used for purposes other than industrial purposes. The work carried on in Warehouse No. 1 chiefly consists of cleaning, testing, analysing and sorting seeds of two sorts—namely, (*a*) vegetable and farm seeds, and (*b*) flower seeds. The former represents not less than 90 per cent. of the Occupiers' turnover in bulk. There is no warehousing as an end in itself of seeds in this building, the Occupiers having other property in Southampton which is used for that purpose. All the seeds above referred to are sold to customers other than the trade. A small quantity is sent to a retail shop occupied by the Occupiers in Southampton. As to the remainder, orders for it are received by the Occupiers at their aforesaid office, and it is dispatched direct to their customers from the warehouse in fulfilment of the orders.

E. Warehouse No. 1 is specially constructed for seed cleaning and is of large dimensions. The floor areas are as follows: The roof floor contains 3875 square feet; the fourth, third, and second floors, 10,292 square feet each; the first floor, 10,245 square feet; the ground floor 10,332 square feet, and the basement 11,642 square feet. The second, third and fourth floors, comprising a floor area of 30,876 square feet, are given up to machinery and accommodation for seeds passing through the machinery. A list of the machinery with notes as to its functions is attached hereto as part of this Case, and marked A. A negligible part of the second floor is used for packeting seeds. On the first floor a hand machine is installed and used for cleaning small seeds, and the remaining floor area is used for packeting seeds. Apart from 1500 square feet used for picking peas by machines the whole of the ground floor is used for the storage of chattels offered for sale by the Occupiers and seeds awaiting dispatch. The basement is used for mixing fertilizers and for hand-picking and grading potatoes. In addition seeds which are rejected for other purposes are ground down and converted

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into food for poultry and birds. The roof floor is used as a testing station and when requisite as a place for conditioning seeds before they are treated by machinery. When it is not in use as a conditioning room it is sometimes used for accommodating surplus stores. The Occupiers do not claim that the use of floor area for packeting seeds or storing chattels or seeds awaiting dispatch is an industrial user within the meaning of s. 4 of the Rating and Valuation (Apportionment) Act, 1928. The floor area allocated to these uses in Warehouse No. 1 is 18,832 square feet.

F. All except a negligible quantity of the seeds which come to the hereditament are in a rough, unclean and impure state. All seeds are submitted to one or other of the treatments hereinafter mentioned or to some similar treatment. Some such treatment is a necessary preliminary to the sale of the seed in order to comply with the provisions of the Seeds Act, 1920, or the standard required in the market in which the Occupiers trade. About 90 per cent. of the seed is within the provisions of the Seeds Act, 1920, and the Statutory Rules and Orders made thereunder. A copy of the Seeds Regulations, 1922, dated August 10, 1922, is annexed to this Case as part thereof, and is marked B.

G. The classes of vegetable and farm seeds treated and prepared for sale in Warehouse No. 1 comprise among others the following: Clovers, grasses, roots, and a small quantity of cereals. Root seeds include seed of swedes, mangolds, beets and turnips. The Seeds Regulations, 1922, apply to all vegetable and farm seeds dealt with by the Occupiers.

H. Some of the methods of treatment of the said seeds adopted by the Occupiers in Warehouse No. 1 are as follows:—

Clover Seed (Red and White).—This seed when received contains many kinds of weed seed, some of which are "injurious" within the meaning of the Seeds Regulations, 1922, and immature and shrivelled seed and inert matter, such as sand and stalks, which are extracted and must in certain instances be extracted to comply with the provisions of the Seeds Act, 1920, and the Statutory Rules and Orders made

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thereunder. The weed seeds are extracted by means of numerous mechanical methods, some of which, in the case of seed which is unusually full of weed seeds, may have to be repeated several times. The use of machinery is essential, as it would be impossible otherwise to separate the good seed from the weed seed.

Another separate and essential method is the extraction of a weed seed known as " Dodder." The Seeds Regulations, 1922, stipulate that the seed sold shall not contain more than one dodder seed in every four ounces of clover seed. Although dodder is sometimes found in English seed, it is found chiefly in seed imported from Chile and Poland. English red clover is often received from the farmer in husks, and when so received must first be decorticated or milled in a way similar to sainfoin. Thirteen sacks of uncleaned red clover yield approximately eight sacks when cleaned.

Sainfoin.—This seed, when received, is in the husk, and contains a considerable quantity of rubbish and many injurious weed seeds. Consequently it is necessary to subject it to several different machine methods in order to rid it of these impurities. The method is as follows :—

(*a*) The cosh (which is the term applied to sainfoin in the husk) when it comes from the grower is first of all rough cleaned from the weeds by passing it over three machines which extract stalks, grass and other rubbish.

(*b*) The cleaned cosh is then decorticated by passing through a huller, with the result that the husks and large unthreshed sainfoin, docks and rollers are separated from the good seed.

(*c*) A sample of the good seed is drawn and analysed and, if it is found to be so free from weeds as to be marketable, nothing more remains to be done to it ; otherwise it must be put through the machines until the required standard of purity is reached.

Grasses.—These have to be thoroughly cleaned before being put upon the market. Two distinct methods are adopted :—

(*a*) Removal of weeds, etc., by revolving cylinders.

(*b*) Removal of chaff and other light impurities by passing over a jumper.

Root Seeds.—(i.) Mangold. The cleaning of this seed, which is often a difficult process, is accomplished by passing the seed as received over two machines. This method has often to be repeated two or three times before the required degree of purity is attained.

(ii.) Turnips, Swedes, etc. These are cleaned by passing over three separate machines—namely, a cascuta, rotary and dosser, which extract: (*a*) the rough stalks, etc.; (*b*) docks and broken seeds; and (*c*) dirt, etc.

Cereals.—These as received from the farmer contain a proportion of other grain, weed seeds, dirt and rubbish. The cleaning is accomplished by passing the grain over two machines—namely, a Triumph corn dressing machine and an adjustable rotary. The separation of tares and oats mixed, and other mixed cereals, is also done by passing the cereals over various machines. Another machine is used for clipping oats.

I. In addition to the aforesaid treatments, seeds of red clover, single cut cow grass, white clover, and wild white clover are passed through Ritz machines for the purpose of breaking down the hard shell or resinous coating of the hard seeds. Without this treatment the hard seeds would not germinate properly. After treatment the seeds are no longer hard and are capable of proper germination.

9. The aforesaid treatments are carried on as an integral part of the Occupiers' business of seedsmen. The Occupiers do not apply the said treatments or any of them to seeds belonging to third parties or for third parties. The average quantity of packeted seeds dealt wfth by the Occupiers at the said hereditament during the last three years amounts to 46 tons per annum, and the average quantity of seeds of all descriptions other than packeted seeds dealt with by the Occupiers at the said hereditament during the same period amounts to 1836 tons per annum.

10. No change in the nature of the individual seeds themselves takes place as a result of the treatments hereinbefore

described except as is herein stated. There is no ground on the said hereditament upon which seeds are grown.

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11. The Occupiers contended :—

(1.) That the hereditament is an industrial hereditament, in that :—

(*a*) It is occupied and used as a factory or workshop within the meaning of the Factory and Workshop Acts, 1901 to 1920 ; and

(*b*) It is not primarily occupied and used for one or other or for any combination of the following purposes—namely, a retail shop or distributive wholesale business or storage or other purposes which are not the purposes of a factory or workshop within the meaning of the Factory and Workshop Acts, 1901 to 1920.

(2.) That the purposes of a seedsman for which the hereditament is used as herein stated are the purposes of a factory or workshop as defined by the Factory and Workshop Acts, 1901 to 1920.

(3.) That the determination and order of the Assessment Committee was wrong in that the hereditament should be included in the special list, and the proportion of the net annual value attributable to the occupation and user thereof for industrial purposes, and the proportion of the net annual value attributable to the occupation for other purposes should be shown in the manner prescribed by s. 4 of the Rating and Valuation (Apportionment) Act, 1928.

12. The Revenue Officer contended :—

(1.) That the decision of the Assessment Committee was right that the hereditament should not be included in the special list.

(2.) That the hereditament is not an industrial hereditament within the meaning of the said Act.

(3.) That the hereditament is primarily occupied and used for one or other or for a combination of the following purposes—namely, a retail shop or distributive wholesale business or storage or other purposes not being those of a factory or workshop.

(4.) That even if the hereditament is occupied and used as a factory or workshop, the occupation and user is ancillary to the purposes of a seedsman, which are not the purposes of a factory or workshop.

13. The question for the opinion of the Court is whether the Assessment Committee came to a correct determination in point of law and, if not, what should be done in the premises.

A.

List of machinery (referred to in paragraph 8 (*e*) of the special case) showing its uses:—

Blower. A mechanical contrivance enabling the operator to vary a blast of air by means of which kernels of seed are in effect weighed and rejected if worm-eaten, infertile, or light, and dust and sand are extracted. There are also fitted interchangeable sieves by means of which stalks, stones, sand, and dirt and other inert matter are extracted.

Cylinders. Long revolving cylinders covered with steel wire of various dimensions enabling docks, small weed seeds, sand, and any small stones and lumps of dirt to be removed.

Dosser. This machine is composed of a series of rollers covered with fine quality velvet, revolving backwards. It finishes the process of cleaning by removing eaten and broken seeds and seed which has been slightly chipped in threshing, and any small docks or sorrel which may escape during the course of the processes described above.

Jumper and *Walworth Separator.* These machines have a jumping action and are fitted with interchangeable sieves of various sizes through which weed seed such as wild geranium is extracted from white clover.

Scarifier. This is used in breaking down the resinous coating of hard seeds of red and wild white clover by means of friction in a cylinder covered with fine steel wire, the friction taking place between the breaker and the cylinders.

Corn Clipper and *Aspirator.* The clipper contains a series of revolving indented discs for clipping oats when necessary. The aspirator is a blower under which are adjustable boards regulating the amount of blast necessary to extract chaff and light and immature seed and other cereals grown with oats.

Cleanall Machine. A vertical machine comprising screen perforated as required to separate good seeds from impurities of all kinds. It is also fitted with a variable air regulator, enabling the operator to separate chaff and light and immature seed from good seed.

Mangel Machine. This machine comprises a combination of a blower and a dosser as described above. The function of the mangel machine is to remove large stalks and any cereals that make their appearance with the mangel seed crop, and to remove small stalks, light and immature seed and any inert matter.

Grass Cleaning Machine. This machine comprises a jumper and indented cylinders like those already described. The function of the machine is to remove chaff, light and inert matter, and such weed seeds as Yorkshire Fog, Venus' Comb, Brome Grass, and other small weeds, sand, etc.

Corn Crusher. A machine used for crushing into meal for feeding purposes all light cereal seeds rejected in any of the processes of cleaning above described.

B.

The Seeds Regulations, 1922 (Statutory Rules and Orders), 1922, No. 915.

[It is thought unnecessary to set out these Rules in this report.]

The Divisional Court (Lord Hewart C.J. and Avory and MacKinnon JJ.) decided in favour of the Occupiers, and ordered that the hereditament should be placed in the special list, and that the rateable value of the hereditament should be apportioned between the occupation and user of the hereditament for industrial purposes and its occupation and user for other purposes.

The Revenue Officer appealed.

Sir William Jowitt A.-G., *Wilfrid Lewis* and *Colin H. Pearson* for the appellant. This case raises two questions First, where one and the same hereditament contains a factory

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in which goods are produced and a retail shop in which the goods are sold, what is the purpose for which the hereditament is primarily occupied and used? Secondly, is this a question of fact or a question of law? The first question has been answered by the House of Lords in *Finn* v. *Kerslake* (1), where the hereditament in question contained a bakehouse and a shop at which the bread and confectionery made in the bakehouse was sold. The House of Lords, approving the dissenting judgment of Lord Hunter in the Court of Session in *Inland Revenue* v. *Gunn, Collie, & Topping* (2), as against the opinion of Lord Sands and Lord Fleming, held that the hereditament was occupied and used primarily for the purpose of the retail shop. If that was a finding of fact it would not lay down any principle binding other Courts in other cases; but if it was a decision on a question of law it binds this Court and all other Courts. Now in *Finn* v. *Kerslake* (1) the Assessment Committee had decided that the hereditament was an industrial hereditament: see the judgment of Scrutton L.J. in this Court (3); that involved a finding that the hereditament was primarily occupied and used for the purposes of a factory. There was no finding one way or the other in the special case. The House of Lords were not the tribunal to find the facts. Therefore the House must be taken to have decided as matter of law that the answer to the first question is: the hereditament is primarily occupied and used for the purposes of a retail shop: *Wilkinson, R. O.* v. *Sibley.* (4)

The office in the present case comes within the definition of a "retail shop" in s. 3, sub-s. 4, which "includes any premises of a similar character where retail trade or business (including repair work) is carried on." These words "premises of a similar character" have been interpreted by the House of Lords as meaning "buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein": *Turpin* v. *Middlesbrough Assessment Committee.* (5)

(1) [1931] A. C. 446, 457, 485.
(2) 1930 S. C. 389.
(3) [1931] 1 K. B. 510.
(4) Ante p. 194.
(5) [1931] A. C. 451, 470, 474.

Singleton K.C. and *C. L. Henderson* for the respondents. This case cannot be distinguished in principle from *Pritchard* v. *William Lewis & Sons* (1), in which this Court held the hereditament to be an industrial hereditament. The decision of this Court came before the House of Lords in *Finn* v. *Kerslake* (2), but none of their Lordships expressed any disapproval of it. In truth *Finn* v. *Kerslake* (2) laid down no general principle. It cannot be maintained as the result of that decision that, where nine-tenths of the product of a factory is sent to a depot and sold there, and one-tenth is sold in a small shop, part of the hereditament containing the factory, there the hereditament is primarily occupied and used for the purposes of the shop. What applies to a confectioner's business need not necessarily apply to other businesses. To have a factory or workshop and a retail shop in the same hereditament may be usual or ordinary, as Lord Dunedin said (2), in the business of a retail baker; the combination may not be ordinary in the business of a milliner or a stationer, for example. It must depend on the nature of the business in each case whether it is usual or ordinary to have a factory in proximity to a retail shop. This consideration explains Lord Dunedin's preference of Lord Hunter's view to that of Lord Sands in *Inland Revenue* v. *Gunn, Collie, & Topping.* (3) The former view appeared to be more applicable to the business in question. The view of Lord Sands might appear more applicable to the facts of the present case or to those in *Wilkinson, R. O.* v. *Sibley* (4), the case of the outfitter and bespoke tailor. *Pritchard* v. *William Lewis & Sons* (1) not having been expressly disapproved by the House of Lords, although it was brought to the attention of their Lordships, should not be taken as overruled. It completely covers the facts of the present case.

Wilfrid Lewis in reply. *Pritchard* v. *William Lewis & Sons* (1) would have been taken to the House of Lords but for a misunderstanding.

(1) [1931] 1 K. B. 386, 456, 502.
(2) [1931] A. C. 446, 457, 485.
(3) 1930 S. C. 389.
(4) Ante p. 194.

LIPTON, LIMITED (OCCUPIERS) *v.* BURTON (REVENUE OFFICER FOR THE METROPOLITAN BOROUGH OF SHOREDITCH ASSESSMENT AREA).

APPEAL from the decision of a Divisional Court upon a case stated under s. 40 of the Rating (Metropolis) Act, 1869, by the Chairman of the Quarter Sessions for the County of London at the instance of the Occupiers, who had appealed from the decision of the Assessment Committee for the Metropolitan Borough of Shoreditch excluding a certain hereditament from the special list as not being an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928. The Quarter Sessions dismissed the appeal, but stated the following special case for the opinion of the King's Bench Division.

8. (i.) Lipton, Ld., are the occupiers within the meaning of the Rating and Valuation (Apportionment) Act, 1928, of a leasehold hereditament situate at and known as 112–122 Tabernacle Street, in the Metropolitan Borough of Shoreditch Assessment Area, and numbered 2291 in the valuation list for the said borough.

(ii.) Sidney Frederick Burton is the Revenue Officer for the above named borough within the meaning of para. 10 of the First Schedule to the said Act.

(iii.) The hereditament is registered under the Factory and Workshop Acts, 1901 to 1920.

(iv.) The Occupiers are importers of teas from Ceylon, Java, India and China and countries elsewhere abroad. The teas are brought to the hereditament and used for the purpose of the business carried on therein and more particularly referred to in sub-para. (vii.) hereof. No tea goes out of the hereditament until after blending; no blended tea from the hereditament is supplied or distributed to any part of the United Kingdom, and no blended tea comes into the hereditament. About 25 tons per week of imported tea is used in the hereditament and no more than the quantity required is stored at the hereditament.

(v.) Teas imported into the United Kingdom are not commercially fit for consumption unless blended owing [sic qu. according] to the taste of the public. All teas imported by the Occupiers are subjected to processes of blending, sifting, cutting and milling in order to comply with the demand of the public for blended teas and to render the imported teas suitable for sale as blended teas.

(vi.) The basement of the hereditament is occupied and used solely as a tin box factory with power presses, shearing, cutting, and tin box making machines. The raw material is brought into the factory in sheets and turned out as the finished article. The tin boxes are used by the Occupiers for packing the blended teas for export and for general use, and are also manufactured under contract for other firms. There are twenty-eight operatives and a supervising manager employed in the factory, the output of which for the past three years amounted to 30,088 gross of tin boxes of a value of over 11,500*l.* In addition the Occupiers have contracts with other firms for the manufacture of tin boxes.

(vii.) The ground floor and four upper floors of the hereditament are used and occupied solely :—

(*a*) As premises for blending, sifting, cutting, milling and packing teas imported by them as aforesaid from abroad so as to make them suitable solely for export abroad for sale wholesale to the public as tea, and

(*b*) As premises for exporting abroad for sale wholesale to the public as blended tea the tea and tea leaves so blended.

(viii.) The processes to which the Occupiers subject on the hereditament the said teas imported by them as aforesaid for the purpose of making their said blended teas and facilitating the sale of their teas as blended teas are as follows :—

(*a*) To grade the various kinds and qualities of teas imported by them.

(*b*) To make from prescriptions a very large number of different blends of teas, each blend being made of 20 or more different kinds of tea in varying proportions so as to neutralize the tannin and caffein present in the said teas.

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(*c*) By mechanical means to sift out and cut to the required length and mill together for each prescribed blend the teas selected for that blend.

(*d*) By mechanical means to weigh into packets containing the requisite weight the tea so blended, and to pack and label the same ready for sale as aforesaid.

(ix.) The hereditament consists of the basement, ground floor and four floors above with a total floor space of 30,665 square feet, of which 6100 square feet comprise the basement, practically all which are used for the processes referred to in sub-para. (viii.) hereof and for making tin boxes, the ground floor and four floors above being used as follows :—

(*a*) On the fourth floor the teas are received from the public warehouses, are unpacked, inspected, sifted, cleaned, passed over magnets, cleansed of all foreign matter and impurities, and cut by machines to the requisite length and passed down for blending to the third floor.

(*b*) On the third floor the teas so sifted, milled, and cut are passed into rotary blending drums, by which they are mixed and blended and then transferred through hoppers to the second floor.

(*c*) On the second floor the blended tea is fed from the hoppers into weighing machines, and thence into filling and labelling machines.

(*d*) On the first floor the packets of tea from the second floor are packed in tin boxes made as described in sub-para. (vi.) hereof, which in their turn are mechanically labelled and wrapped.

(*e*) On the ground floor the tin boxes filled with packets of blended tea are packed into crates and dispatched to the docks for shipment abroad.

(x.) The Occupiers employ twenty-two men and seventy-five women on the hereditament in connection with the said processes of blending tea. In addition there are a factory manager and assistant and a foreman.

(xi.) In the year 1926 they blended, packed and exported from the hereditament to all parts of the world 1341 tons, in the year 1927 1249 tons, and in the year 1928 1253 tons. No teas blended on the hereditament were supplied to any branch of the Occupiers in the United Kingdom or disposed of in any way other than by export abroad.

9. The hereditament is occupied and used for the purposes enumerated in para. 8, sub-paras. (iv.) to (ix.) hereof solely (save as set out in sub-para. (vi.)) in connection with the Occupiers' business or trade of tea merchants and exporters of blended teas and tea leaves for export abroad to wholesalers.

10. A copy of the valuation list, so far as the same relates to the hereditament, marked A, and a copy of the Occupiers' notice of appeal, marked B, are annexed to and form part of this Case.

11. The Occupiers contended that the hereditament was an industrial hereditament, and that it was not primarily occupied or used for any of the purposes set out in the proviso to s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928.

12. The Revenue Officer contended that the hereditament was not an industrial hereditament; that it was primarily occupied and used for the purposes set out in paras. (*c*), (*d*) and (*f*) of the proviso to s. 3, sub-s. 1, of the said Act or one or other of them, or for a combination of those purposes; and that, even if the hereditament was occupied and used as a factory or workshop, the occupation and user was ancillary to other purposes not being the purposes of a factory or workshop; and that the onus of satisfying the Court that the hereditament was not primarily occupied and used for one or other of the aforesaid purposes or for a combination of the same was upon the Occupiers, and that they had failed to discharge the onus.

The Quarter Sessions held that the hereditament was not an industrial hereditament.

The question for the opinion of the Divisional Court was whether the hereditament was in law an industrial hereditament within the meaning of s. 3, sub-s. 1, of the said Act.

The Divisional Court (Lord Hewart C.J., and Avory and MacKinnon JJ.) held that the hereditament was an industrial hereditament.

The Revenue Officer appealed.

Wilfrid Lewis and *Colin H. Pearson* (*Sir William Jowitt A.-G.* with them) for the appellant. Except that the question here is whether the hereditament is used for the purpose of a distributive wholesale business instead of that of a retail shop, there is no material distinction between the facts of this case and those of *Toogood & Sons* v. *Green.* The special case states that the hereditament is occupied and used for blending, sifting, cutting and milling tea for export abroad to wholesalers for sale wholesale to the public. In other words the business carried on in the hereditament is a distributive wholesale business: see paragraph 9 of the special case.

Hilbery K.C. and *Kimber* for the respondents were not called upon.

SCRUTTON L.J. There is a difference of opinion in the Court upon one point, the effect of the decision in *Finn* v. *Kerslake.* (1) The sooner these cases are taken to the House of Lords the better, so that the exact meaning of that case may be explained. In my preliminary survey of the first group of cases which we heard upon the question, what is an industrial hereditament, I said (2): "In my view the proviso of the Act dealing with primary purpose was intended to cover the following state of things. You find on a hereditament something which is a 'factory or workshop,' but you also find on the hereditament something which is not a factory or workshop, a dwelling-house, a retail shop"—I emphasize that—"the offices of a distributive wholesale business"—I emphasize that—"a large store. If after considering the relevant evidence, area of the various uses of the hereditament, their respective values, comparison of the amount of work done under each head, you are satisfied that

(1) [1931] A. C. 446, 457, 485. (2) [1931] 1 K. B. 487.

the primary, principal, substantial use and purpose of the hereditament is non-factory, you do not derate; for the hereditament is not industrial."

Now the argument presented to us in these two cases is that the above passage is wrong; that if upon a hereditament being a factory you find a retail shop where goods made in the factory are sold, you cannot dissect the business of the hereditament and there is no question of primary purpose at all. Similarly, says Mr. Wilfrid Lewis, if you find on the hereditament offices of a distributive wholesale business, where goods made in the factory are sent out, the House of Lords has held that you cannot dissect the business done on the hereditament and say that part of it is the business of a factory and part a distributive wholesale business, but must consider what is the primary purpose of the whole undivided business. The case in which Mr. Lewis intended to raise this point is the second case we have just heard, *Lipton, Ld.* v. *Burton*. Lipton, Ld., occupy a hereditament with a ground floor and four upper floors, which they use for blending, sifting, cutting, milling and packing teas so as to make them suitable solely for export. He says there is a further finding that the hereditament is used for exporting abroad for sale wholesale, and that means that a distributive wholesale business is carried on upon the hereditament. Consequently, he argues, in view of the opinion of the House of Lords in *Finn* v. *Kerslake* (1), here is a distributive wholesale business carried on at the hereditament; you cannot dissect that business and it is merely irrelevant to urge that the goods distributed are actually made upon the hereditament.

In my view the facts do not enable Mr. Lewis to raise this point. All that appears in this case is that goods made on the hereditament are sent out to be disposed of elsewhere in a distributive wholesale business. When the cases concerning industrial hereditaments first came before the Courts the mistake was made, as the House of Lords have now held, affirming the Court of Appeal, of thinking that the purposes for which goods made on a hereditament were used outside the hereditament might be looked at in order to ascertain the character of the hereditament; for example, if goods made on a hereditament were found to be regularly sent to a retail shop for sale, it was thought that the Court might hold the primary purpose of the hereditament to be that of a retail shop; and if goods made on the hereditament were sent out to be sold wholesale elsewhere, the primary purpose of the hereditament might be taken to be distributive wholesale business; and so in either case the hereditament might be held not to be an industrial hereditament. But this Court and the House of Lords have held that view of the Act to be wrong, and that regard must be confined to what is done on the hereditament. In the present case tea blended on the hereditament is sent out to be sold elsewhere. That is all that appears. By the decision of the House of Lords that does not justify the appellant in saying that the primary purpose of the hereditament is distributive wholesale business and that therefore the hereditament is not an industrial hereditament. It follows that the appeal in *Lipton* v. *Burton* must be dismissed.

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(1) [1931] A. C. 446, 457, 485.

Toogood & Sons v. *Green*, the first case argued before us, raises a much more difficult question. The hereditament in this case is largely devoted to the cleaning of seeds. In the first group of cases in this Court there were two dealing with hereditaments similarly used. The main point in those cases was whether the cleaning of seeds was a process of adapting for sale, that is, a factory process—though I think the point above mentioned, about the use of a product outside the hereditament, still remains. The first group also contained cases relating to scrap iron, and the sorting of rags, raising the question whether these processes could be said to be adapting for sale within the meaning of s. 149 of the Factory and Workshop Act, 1901. In one of these cases, *Hines* v. *Eastern Counties Farmers' Co-operative Association* (1), no sale, wholesale or retail, took place on the hereditament, and the only question, apart from the question of adapting for sale, which could be raised was whether future dealings with the seed outside the hereditament could be looked at to ascertain the primary purpose of the hereditament, whether if the seed was being sold by retail or distributed wholesale elsewhere that fact could be regarded. But in another case, *Pritchard* v. *William Lewis & Sons* (1), the facts were different. There were two large warehouses and a shop connected together. It was found in the special case (2) that: "The Occupiers carry on a wholesale as well as a retail trade, but none of their wholesale trade is done from the aforesaid hereditament. . . . . Except for a negligible quantity the whole of the grain and commodities that come into the said warehouses are passed through the aforesaid machinery and not more than 3 per cent. of the whole of the seeds and commodities dealt with in the warehouses are retailed in the aforesaid shop." But the case goes on to state: "Ninety-seven per cent. of the output of the warehouses is sold direct to farmers, colliery owners, haulage contractors, etc., in fulfilment of orders received from those customers either at the said shop or elsewhere." That is to say, 3 per cent. of the product was actually sold and handed over in the shop, and orders were received from other customers at the shop and were executed from the shop. On the hereditament largely used for adapting for sale there was a shop at which the products so adapted for sale were sold.

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(1) [1931] 1 K. B. 386, 446, 502; [1931] A. C. 446, 456, 477.

Now it seems to me, and I think Mr. Wilfrid Lewis agrees, that the facts in *Toogood & Sons* v. *Green* are substantially the same as those in *Pritchard* v. *William Lewis & Sons*. (1) The hereditament in question comprises three buildings, a very large building called Warehouse No. 1, the value of which is 710*l*., and two other buildings of the aggregate value of 136*l*. The floor area of Warehouse No. 1 is much larger than that of the other two buildings. One of these is a block of offices. Of the product adapted for sale on the hereditament a small quantity is sent to a retail shop of the Occupiers in Southampton; the remainder of the product is dispatched direct from the warehouse to customers in fulfilment of orders received by the Occupiers at their aforesaid offices.

(1) [1931] 1 K. B. 386, 456, 502.

(2) [1931] 1 K. B. 458.

In *Pritchard* v. *William Lewis & Sons* (1) the judgment of this Court, on facts practically the same as those in the present case, was that the premises of William Lewis & Sons were to be placed in a special list and that their rateable value should be apportioned. The judgment calls attention pointedly to the retail shop in that case. Then, following the general principle that if a hereditament contains both a factory and a retail shop, the question is what is the primary purpose of the hereditament, the Court decided, having the retail shop well in mind, that the hereditament in so far as it was a factory was the subject of derating. Then there was an appeal to the House of Lords. There was also pending an appeal to the House of Lords in *Hines* v. *Eastern Counties Farmers' Co-operative Association.* (2) It seems that the parties in *William Lewis & Sons'* case (3) agreed to be bound by the judgment of the House of Lords in *Hines's* case. (4) However that may be, the arguments in *Hines's* case (4) were heard, and the judgment of this Court (5), which dealt with both the cases, was read to the House of Lords, and their Lordships affirmed our judgment in *Hines's* case (4) without any allusion to the retail shop in *William Lewis & Sons'* case (6), or any warning that their decision did not apply to that case, in which there was an appeal pending but not yet heard.

The question then is this: here is an express decision of this Court on facts which cannot be distinguished; ought I to treat that express decision as overruled in the absence of a clear decision of the House of Lords that it is overruled? In my opinion I ought not. I must treat myself as bound by the decision of this Court, unless the House of Lords overrules *William Lewis & Sons'* case. (6) It is said that the House of Lords has overruled that case already by their decision in *Finn* v. *Kerslake* (7), where the hereditament was a baker's shop which had behind it as a separate building a bakery. No one, I think, disputes that if the bakery had been one hereditament and the shop another the bakery would have been derated. But the House of Lords took the view that " the bake-house at the back of the shop, which makes the goods for the retail business, is an ordinary part of a retail baker's shop and . . . . merely ancillary to the trade or business carried on in the shop." If that is a finding of fact I confess I cannot agree with it. I cannot think that production is ancillary to distribution. Production seems to me, if it is matter of fact, to be the main thing, and distribution the ancillary result of having produced and desiring to get rid of the product at a profit. The next sentence in the judgment is (1): " I have no doubt, on the facts of this business, that the whole hereditament is used and occupied for the purposes of a retail baker's shop." I have considerable doubt whether on the facts stated in this case the hereditament in question is used and occupied for the purposes of a retail shop. It appears to me to be very unlike a baker's shop to which people come to buy bread or confectionery. In *William Lewis & Sons*' case (2) there was a finding that orders were received at the offices of the Occupiers. Here also there is an office in what is apparently a large factory. The passage which follows in the judgment of the House of Lords (1) appears to lay down a principle. I do not for a moment overlook that. It is in these words: " The decision of the Court of Appeal, in agreement with the reasoning in some Scottish cases, to which we were also referred, was based on a separation of the bakehouse from the shop, and the inability to determine that the shop was the primary purpose. As already stated, I am of opinion that the dissection of a unified business such as is in fact carried on here is not justified." It does not say that the dissection of a unified business cannot be justified, but that the dissection of a unified business such as is in fact carried on in that case cannot be justified. It goes on: " I prefer the reasoning of Lord Hunter in his dissent in *Inland Revenue* v. *Gunn, Collie, & Topping* (3), where he

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(1) [1931] 1 K. B. 502–505.

(2) [1931] 1 K. B. 386, 446, 502; [1931] A. C. 456, 477.

(3) [1931] 1 K. B. 456, 502.

(4) [1931] A. C. 456, 477.

(5) [1931] 1 K. B. 446, 502.

(6) [1931] 1 K. B. 386, 456.

(7) [1931] A. C. 457, 485.

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(1) [1931] A. C. 487.

(2) [1931] 1 K. B. 386, 456 ,459.

(3) 1930 S. C. 389, 401.

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says, 'It may be contended with force that, if a large part of the premises is devoted to the purposes of manufacture or adaptation of goods for sale, all that you can affirm is that the premises are partly used for the purposes of retail business. On the other hand, it may be said that, as nothing is manufactured or adapted for sale in any part of the premises, except for the purpose of satisfying the requirements of customers to whom goods have been sold retail, the primary purpose for which the building as a whole is used is the carrying on of a retail business. My own view is in favour of the latter construction.' " Lord Dunedin, in giving the judgment of the House, is adopting Lord Hunter's view; but it will be noticed that Lord Hunter was the judge of the Court of Session who, in deciding whether a hereditament was an industrial hereditament, allowed the consideration of the purposes outside the hereditament for which the product of the hereditament was used, and, as I read the passage in Lord Hunter's judgment, he is repeating his original view that if goods are made on a hereditament for sale outside the hereditament that fact may be taken into account in considering the purpose for which the hereditament, being a factory, is used. But that view has been overruled in the House of Lords, and it is now clear that where there is a hereditament which is a factory, the uses outside the hereditament to which the product of the hereditament is put, such as sale outside the hereditament, are not to be considered in determining whether the hereditament is an industrial hereditament. In *Wilkinson, R. O.* v. *Sibley* (1), which was heard in this Court after the decision of the House of Lords in *Finn* v. *Kerslake* (2), we had to consider this matter again, and came to the conclusion that it had been decided as matter of law that when there is a workshop and a retail shop on the same hereditament the unified business cannot be dissected, and I raised the question, which I hope will be answered if this case is taken to the House of Lords, what is to happen if the occupier of a hereditament, which contains a factory or workshop, sells part of the product on

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(1) Ante p. 194.

(2) [1931] A. C. 446, 457, 485.

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the hereditament and part of it elsewhere ? Can the business then be dissected, or must it be held as matter of law that if any of the goods sold on the hereditament have been made on the hereditament then the business cannot be dissected and the whole hereditament is a retail shop ?

In this state of the authorities I have to consider the position of this Court in the present case. There is an express decision of this Court on facts which cannot be distinguished. There is a principle laid down by the House of Lords upon similar facts, and based upon a passage in a judgment of the Court of Session which in my view has been overruled, and containing no reference to the former judgment of this Court. Am I to treat that principle as overruling the express decision of this Court ? In my view, as a matter of judicial comity I am not entitled to say that I will not follow the decision of this Court. If I am wrong, it will be for the House of Lords to say whether I have misunderstood the effect of the previous decisions. For these reasons, though I respect the view my brothers take of the case, I personally should dismiss this appeal.

Greer L.J. In my judgment the questions raised by these two appeals would have been very difficult to answer but for the decision of the House of Lords in *Finn* v. *Kerslake* (1), but they have become simple questions by reason of the decisions of the House of Lords. Dealing first with *Lipton* v. *Burton*, the facts in that case are indistinguishable from those in *Sedgwick* v. *Watney, Combe, Reid & Co.* (2) and *Barton* v. *R. Twining & Co.* (3) Mr. Wilfrid Lewis pointed to the finding in *Lipton* v. *Burton*, that the hereditament was used in part "for exporting abroad for sale wholesale to the public," and relied on it to distinguish that case from *Sedgwick* v. *Watney, Combe, Reid & Co.* (2) ; but I agree that the finding merely means that the tea when blended and packed goes out for the purpose of being sold

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(1) [1931] A. C. 446, 457, 485. (2) [1931] A. C. 446, 447, 461.
(3) [1931] 1 K. B. 386, 475.

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wholesale elsewhere. No facts are stated which indicate that any sale or other distributive business takes place on the hereditament or is carried on there. In my opinion the case is indistinguishable from the two cases I have mentioned.

In *Toogood & Sons* v. *Green* I cannot distinguish the facts from those on which the House of Lords gave their judgment in *Finn* v. *Kerslake* (1); *Turpin* v. *Middlesbrough Assessment Committee* (2); and *Kaye* v. *Eyre Brothers* (3); and in my opinion those cases are inconsistent with the judgment of this Court in *Pritchard* v. *William Lewis & Sons.* (4). *Wilkinson, R. O.* v. *Sibley* (5) must be regarded as a decision upon a question of law, the question being whether upon the facts stated the tribunal below had taken the right view. The principle underlying the decision in *Finn* v. *Kerslake* (1) governs *Toogood & Sons* v. *Green.* In order to find what law is involved in the decision of a Court one must look to find the general proposition which forms the basis of the judgment. Jurists call this general proposition the ratio decidendi, and they look for it more in the facts of the case than they do in the actual wording of the decision. But in whichever way we seek it, the three cases I have mentioned seem to me to involve a rule of law in accordance with which we must allow this appeal. That rule of law may be thus stated: where a factory is used for adapting goods for sale by retail, and the business of the occupier consists of selling by retail and delivering from the hereditament the goods so adapted, then as matter of law the hereditament is primarily occupied and used for the purpose of a retail shop within the meaning of s. 3, sub-s. 1 (*b*), of the Rating and Valuation (Apportionment) Act, 1928. One of the judgments in the House of Lords might be taken as suggesting that the question was merely a matter of an ordinary and usual meaning to the words used in the definition. I doubt if that is strictly accurate when a retail shop is in question. We are not left merely to the average man's interpretation of the words "retail shop." There is a statutory definition giving an extended and conventional meaning to the words. "Retail shop" is said in the last paragraph to s. 3 to include "any premises of a similar character where retail trade or business, including repair work, is carried on." There cannot be any doubt that on these premises retail trade or business is carried on. Orders are received there, customers resort to them, it may be by post, for the purpose of purchasing that which is adapted for sale on these premises, and from these premises their wants are supplied. Therefore we have premises in which a retail trade or business is carried on. Are they of a character similar to that of a shop? By the light of Nature I should have thought that question had reference to the appearance of the shop. The other part of the definition, "where retail trade or business is carried on," indicates the nature of the business, and one would expect the words "of a similar character" to have a limiting effect. But it seems that this is not so, for in *Turpin* v. *Middlesbrough Assessment Committee* (1) the House of Lords apparently came to the conclusion stated in these words: "Now if we compare the hereditament here in question with a retail shop, do we find any common characteristics? My Lords, I think we do; for they are both buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein." That applies to the premises of Messrs. Toogood & Sons. They are premises to which the public can and do in large numbers resort for the purpose of obtaining the seeds they wish to buy.

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(1) [1931] A. C. 446, 457, 485.

(2) [1931] A. C. 446, 451, 470, 474.

(3) [1931] A. C. 446, 451, 475.

(4) [1931] 1 K. B. 446, 456.

(5) Ante p. 194.

It is unfortunate that, owing to a misunderstanding, by an agreement which ought never to have been made, *Pritchard* v. *William Lewis & Sons* (2) never came before the House of Lords. If it had come before the same House which decided the three other cases, I cannot help thinking that it would have met with the same fate as they did.

For these reasons I think that the appeal in *Toogood & Sons*' case should be allowed.

(1) [1931] A. C. 446, 451, 470, 474. (2) [1931] 1 K. B. 386, 456.

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Slesser L.J. I agree with the judgment of Greer L.J. In my view *Finn* v. *Kerslake* (1) and *Turpin* v. *Middlesbrough Assessment Committee* (2) when taken together lay down a principle which should guide us in this case. *Finn* v. *Kerslake* (1) makes it clear that where a hereditament is occupied and used for one trade or business, and that trade or business is a retail trade, the production of goods upon the hereditament for the supply of the retail trade is ancillary to the retail trade. The only difference between this case and *Finn* v. *Kerslake* (1) is that the hereditament in question in *Finn* v. *Kerslake* (1) comprised that which was, and was intended to be, a shop in the ordinary sense of the word, and it was unnecessary to have recourse to the definition in s. 3 of the Act, which gives the word a wider meaning. Whatever doubt might exist after the decision in *Finn* v. *Kerslake* (1), it is quite clear from *Turpin* v. *Middlesbrough Assessment Committee* (2) that "shop" as defined by s. 3 includes a building having this characteristic in common with a retail shop, that the public can resort to it for the purpose of having particular wants supplied and services rendered therein. Here the facts are found that the Occupiers carry on the business of retail seedsmen at the hereditament; that the treating of seeds is an integral part of their business of seedsmen; that all the seeds treated by them are sold to customers other than the trade, except a small quantity which is sent to a small shop occupied by them in Southampton; and with regard to the remainder, orders are received by the Occupiers at their office in the hereditament and the seeds are dispatched direct to their customers from the warehouse in the hereditament in fulfilment of the orders. Thus the preparation and treatment of the seeds are almost entirely devoted to the sale by retail through this office to the public. That constitutes the hereditament a retail shop within the statutory definition as interpreted in *Turpin's* case (2), and it follows that it is a hereditament occupied for the purpose of a retail shop within the principle of *Finn* v. *Kerslake*. (1) Moreover, in *Wilkinson*

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(1) [1931] A. C. 446, 457, 485.

(2) [1931] A. C. 446, 451, 470.

v. *Sibley* (1) this Court expressed the opinion that in *Finn* v. *Kerslake* (2) the House of Lords had decided as matter of law that where the product of a hereditament is devoted exclusively to the purpose of supplying the demands of a retail shop, the hereditament is occupied and used for the purpose of the shop. So far as I am concerned, I said (3): "It has now been laid down by the House of Lords as matter of law that, where a hereditament consists of a factory and a retail shop, and the product of the factory is disposed of through the retail shop, the hereditament is occupied and used for the purpose of the retail shop." The judgments of my brothers are, as I read them, to the same effect. It is true that in *Pritchard* v. *William Lewis & Sons* (4) this Court on facts like those in this case decided the other way, that the hereditament in question was not primarily occupied and used as a shop. The hereditament in that case was used for the preparation of seeds which were sold in a shop. In my view that case must now, however, be taken to be overruled, and if we were considering it to-day for the first time I think that in obedience to the decision of the House of Lords we should have to come to the opposite conclusion: see the observations of Warrington L.J. in *Consett Industrial and Provident Society* v. *Consett Iron Co.* (5) We find a decision of a superior Court inconsistent with the conclusion arrived at in *Pritchard's* case (4), and therefore, although the facts are not exactly the same in the two cases, the principle enunciated in the House of Lords binds this Court just as it would if *Pritchard's* case (4) were being heard now for the first time by this Court. I think it is no longer open to us to say we ought to follow the decision in that case.

I would only add that in *Lipton, Ld.* v. *Burton* I agree the appeal should be dismissed. In *Moon* v. *London County Council* (6) Lord Buckmaster said: "It appears to me that running through the statute is the idea of exempting particular

(1) Ante p. 194.
(2) [1931] A. C. 446, 457, 485.
(3) Ante p. 203.
(4) [1931] 1 K. B. 386, 456.
(5) [1922] 2 Ch. 135, 173.
(6) [1931] A. C. 151, 158.

premises described throughout as hereditaments, and that it is the use to which those premises are put that must be considered and not what may be ultimately done with whatever commodity they create." The finding upon which Mr. Wilfrid Lewis relies is that the ground floor and four upper floors of the hereditament are used and occupied solely "as premises for exporting abroad for sale wholesale to the public as blended tea the tea and tea leaves so blended." Looking, as Lord Buckmaster in the House of Lords directs, at the premises and not at the ultimate purpose or destination of the goods, we see that the hereditament is used for exporting the tea blended upon the hereditament. There is no finding that wholesale business is carried on there. When a case is stated in which that fact is found the question will arise whether the hereditament is occupied and used for the purpose of a distributive wholesale business. For the present I am of opinion that this case cannot be distinguished from *Sedgwick* v. *Watney, Combe, Reid & Co.* (1), and the appeal must be dismissed.

TOOGOOD AND SONS, LIMITED *v.* GREEN.

Appeal allowed.

Solicitor for appellant: *The Treasury Solicitor.*
Solicitor for respondents: *Herbert Smith.*

LIPTON, LIMITED *v.* BURTON.

Appeal dismissed.

Solicitor for appellant: *The Treasury Solicitor.*
Solicitor for respondents: *T. H. B. Bamford.*

W. H. G.

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(1) [1931] A. C. 446, 447, 461.

MILLS CONDUIT INVESTMENT, LIMITED *v.* LESLIE AND ANOTHER.

C. A.
1931
June 17.

[1931. M. 1175.]

Money-lender—Loan Transaction—Rate of Interest—Forty-eight per cent. per Annum exceeded—Excessive Interest—Burden of Proof—Consent to Judgment—Moneylenders Act, 1900 (63 *&* 64 *Vict. c.* 51), *s.* 1—*Moneylenders Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 10.

By s. 10 of the Moneylenders Act, 1927: "Where, in any proceedings in respect of any money lent by a moneylender . . . . or in respect of any agreement or security made or taken . . . . in respect of money lent . . . , it is found that the interest charged exceeds the rate of forty-eight per cent. per annum . . . . the court shall, unless the contrary is proved, presume for the purposes of s. 1 of the Moneylenders Act, 1900, that the interest charged is excessive and that the transaction is harsh and unconscionable." . . . .

Money-lenders brought an action against the two joint and several makers of a promissory note for 466*l.* 13*s.* 4*d.* being as to 400*l.* principal and as to the balance interest at the rate of 200 per cent. per annum. One of the defendants failed to enter an appearance. Against the other defendant the plaintiffs obtained an order that unless he paid 400*l.* within a specified time, they should be at liberty to sign judgment against him for that amount, and that as to the balance of the claim the defendant should be at liberty to defend on certain conditions. Afterwards the defendant agreed to submit to judgment against him for the full amount claimed. On an application for judgment the Master in Chambers refused the plaintiffs leave to sign judgment, on the ground that there was no proof that the interest was not harsh and unconscionable. On appeal from the order of the Judge in Chambers affirming the order of the Master:—

Held, y the full Court of Appeal, that the defendant's consent to judgment did not relieve the Court of its duty to presume that the interest charged was excessive and that the transaction was harsh and unconscionable unless the contrary was proved; that the question was whether in the circumstances the consent of the defendant to judgment proved the contrary, and that the learned judge was right in holding that it did not.

Appeal from an order of Macnaghten J. in Chambers.

The plaintiffs, a firm of registered money-lenders, brought an action against the defendants, Leslie and Denholm, joint and several makers of a promissory note dated February 28, 1931, for 466*l.* 13*s.* 4*d.* The particulars of claim were stated on the specially indorsed writ as follows:—

"Principal, 400*l.* Interest from February 28, 1931, to March 31, 1931, 66*l.* 13*s.* 4*d.* The interest charged is 200 per cent. per annum. The contract for repayment was made on February 28, 1931. A note or memorandum of the contract was made and signed by the borrowers. A copy of this document was delivered to the borrowers on February 28, 1931. Nothing has been repaid. The amount due but unpaid is 400*l.* This sum became due on March 31, 1931. The amount of interest accrued due but unpaid on that sum is 66*l.* 13*s.* 4*d.*"

The plaintiffs claimed interest at the rate of 200 per cent. per annum on the sum of 466*l.* 13*s.* 4*d.* from March 31, 1931, till payment or judgment. The defendant Leslie did not enter an appearance.

The plaintiffs applied for leave to sign final judgment for the amount claimed. On April 17, 1931, Master Ball made an order "that unless the defendant Denholm pays to the plaintiffs the sum of 400*l.* within four days from the date of this order, the plaintiffs be at liberty to sign final judgment against the said defendant for the said sum," and "that as to the balance of the plaintiffs' claim . . . . the said defendant be at liberty to defend the action on condition that the action be entered in the Short Cause List for trial by a judge alone."

By s. 1, sub-s. 1, of the Moneylenders Act, 1900, where proceedings are taken in any Court by a money-lender for the recovery of any money lent or the enforcement of any agreement or security made or taken in respect of money lent, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or otherwise such that a Court of equity would give relief, the Court may re-open the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by

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the Court to be fairly due in respect of such principal, interest and charges, as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and may set aside or revise any agreement made in respect of money lent by the money-lender.

By s. 10 of the Moneylenders Act, 1927, "Where, in any proceedings in respect of any money lent by a moneylender . . . . or in respect of any agreement or security made or taken . . . . in respect of money lent . . . ., it is found that the interest charged exceeds the rate of forty-eight per cent. per annum . . . . the court shall, unless the contrary is proved, presume for the purposes of s. 1 of the Moneylenders Act, 1900, that the interest charged is excessive and that the transaction is harsh and unconscionable." . . . .

After the order of April 17, 1931, was made, the plaintiffs and the defendant Denholm approached each other, and this defendant found himself prepared to consent to judgment for the full amount claimed. Thereupon a second application was made to the Master in Chambers, Master Moseley, who happened to be sitting for Master Ball. The application was "that notwithstanding the order of Master Ball, dated April 17, 1931, the plaintiffs be at liberty to sign final judgment against the defendant Denholm for the amount claimed, and interest if any and costs to be taxed. Execution to be stayed until May 4, 1931." The notice of application was indorsed: "Take order as by Master," and this indorsement was signed: "Walker, Rowe & Clark, solicitors for the defendant Denholm. Woolfe & Woolfe for the plaintiffs." The application was heard on April 27, and Master Moseley made an order in these terms: "Consent refused, as no proof that interest is not harsh and unconscionable." The plaintiffs appealed, and Macnaghten J., the Judge in Chambers, affirmed the order of the Master. The plaintiffs, by leave of the learned judge, appealed to the Court of Appeal.

As the matter was one of public importance,

Sir William Jowitt A.-G. and *Wilfrid Lewis* for the Crown intervened in the proceedings.

Sir Patrick Hastings K.C. and *Wallington* for the appellants.

Melford Stevenson and *Basil Blagden* for the respondent.

The arguments of counsel sufficiently appear in the judgment of the Master of the Rolls.

Lord Hanworth M.R. This is an appeal from an order of Macnaghten J. made on May 5, 1931. The action was commenced by a writ dated April 2 issued by the appellants, who are registered money-lenders, against two defendants, makers of a joint and several promissory note dated February 28, 1931, for 466*l.* 13*s.* 4*d.* payable on March 28, 1931. By the terms of the note, should default be made in payment of the principal or interest or any part thereof, the whole amount of principal and interest was to become payable immediately, together with simple interest on the principal and interest remaining unpaid at the rate of 200 per cent. per annum till payment. The defendants made default in payment on February 28. On the specially indorsed writ the particulars are stated in more than usual detail. They are in the following words: "Principal 400*l.* Interest from February 28, 1931, to March 31, 1931, date of default, 66*l.* 13*s.* 4*d.* (Total) 466*l.* 13*s.* 4*d.*" They continue thus: "(*a*) The plaintiffs are licensed money-lenders. (*b*) The loan was made on February 28, 1931. (*c*) The amount actually lent was 400*l.* (*d*) The interest charged is 200 per cent. per annum. (*e*) The contract for repayment was made on February 28, 1931. (*f*) A note or memorandum of the contract was made and signed by the borrowers. (*g*) A copy of such document was delivered to the borrowers on February 28, 1931. (*h*) Nothing has been repaid. (*i*) The amount due but unpaid is 400*l.* (*j*) This unpaid sum became due on March 31, 1931. (*k*) The amount of interest accrued due but unpaid on that sum is 66*l.* 13*s.* 4*d.*" The plaintiffs claimed interest at the rate of 200*l.* per cent. per annum on the sum of 466*l.* 13*s.* 4*d.* from March 31, 1931, till payment or judgment, and applied for leave to sign final judgment for the amount claimed. On April 17, 1931, Master Ball made an order "that unless the defendant Robert Denholm pays to the plaintiffs' solicitors the sum of 400*l.* within four

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days from the date of this order, the plaintiffs be at liberty to sign final judgment against the said defendant for the said sum" and "that as to the balance of the plaintiffs' claim it is ordered that the said defendant be at liberty to defend the action on condition that the action be entered in the Short Cause List for trial by a judge alone." . . . . This order was made against the defendant Denholm only because of the two defendants served the defendant Denholm alone entered an appearance.

After that order was made it seems that the plaintiffs and the defendant Denholm approached one another, with the result that Denholm found himself prepared to consent to judgment against him for the full amount without taking advantage of the order of April 17. A subsequent application was then made by the plaintiffs to the Master in Chambers "that notwithstanding the order of Master Ball dated April 17, 1931, the plaintiffs be at liberty to sign final judgment against the defendant Denholm for the amount claimed and interest if any and costs to be taxed. Execution to be stayed until May 4, 1931." The notice of application was indorsed: "Take order as by Master," and the indorsement was signed: "Walker, Rowe & Clark, solicitors for the defendant Denholm. Woolfe & Woolfe for the plaintiffs."

The Attorney-General has commented upon the fact that the matter had already been dealt with by Master Ball, and has asked by what procedure a fresh application could be made to the Master that "notwithstanding the former order" the applicants might have leave to sign judgment. It may be that this question will arise for definite decision at some future time. I express no opinion upon it to-day. The application was heard on April 27 by Master Moseley, who made an order in these terms: "Consent refused as no proof that interest is not harsh and unconscionable." From this order of Master Moseley the plaintiffs appealed to the judge in Chambers. On May 5, 1931, Macnaghten J., the judge in Chambers, dismissed the appeal, being of opinion that the Master was right having regard to the provisions of s. 10 of the Moneylenders Act, 1927. By leave of the learned judge the plaintiffs on May 15 gave notice of appeal from the order of May 5, and prayed an order that they might be at liberty to sign final judgment for the amount claimed upon the terms as to stay of execution indorsed on the summons heard by Master Moseley. The appeal now comes before this Court.

The question for our decision is whether the order of Macnaghten J. is right or not. The learned judge in his order refers to s. 10 of the Moneylenders Act, 1927. That section is directory. Where in given circumstances—namely, in any proceedings in respect of any money lent by a money-lender—the Court finds that the interest charged exceeds the rate of forty-eight per cent. per annum, the Court is directed, unless the contrary is proved, to presume that the interest is excessive and that the transaction is harsh and unconscionable. Turning to the Act of 1900, that Act, by s. 1, sub-s. 1, provided that where proceedings are taken in any Court by a money-lender for the recovery of any money lent or the enforcement of any agreement or security made or taken in respect of money lent, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a Court of equity would give relief, the Court may reopen the transaction. By sub-s. 2, any Court in which proceedings may be taken for the recovery of money lent by a money-lender may exercise the like powers to those conferred by the section and may entertain any application by the borrower or other person liable, notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived. Sect. 10 of the later Act was intended to enlarge the scope of the Court's remedial action under the earlier Act. It directs that when a certain rate of interest is reached the Court is to assume that the interest charged is excessive and that the transaction is harsh and unconscionable, and that the matter is one for the exercise of the jurisdiction of the Court under the Act of 1900, unless the contrary is proved.

I pause here to notice an argument of Mr. Wallington, that "the Court" in these sections means a Court sitting for the trial of an action in which evidence is given and that only in such proceedings are the powers of the Court adduced. I need only say that I find no such limitation upon the word "proceedings." In both sections the word means proceedings of any nature in which the Court is acting according to the rules of procedure in that Court. Nor can I see any reason why the suggested limitation should be put upon the word "Court." Macnaghten J. has held that the Master's order was right, regard being had to the provisions of the Moneylenders Act, 1927, that is to say, that it was the duty of the Master upon the facts before him to take note of the amount of interest charged and, seeing that it exceeded the rate of forty-eight per cent. per annum, to presume, until the contrary was proved, that the interest was excessive and that the transaction was harsh and unconscionable.

It has been argued that the contrary has been proved, and the presumption rebutted, by reason of the consent given by Denholm that judgment should be signed against him; that it was the duty of the Master to give effect to that consent and give the appellants leave to sign judgment subject only to the condition of a stay of execution until May 4. We do not take that view. The consent of the parties cannot relax the duty or lessen the powers of the Court. I would refer to the observation of Alderson B. arguendo in *Wade* v. *Simeon* (1): "It is open to the Court, at any time before judgment signed and execution executed, to see that that which is done under the authority of the Court shall not be done unjustly." That dictum is given its full effect in the decision of the Court holding that a judge's order, obtained by consent, staying proceedings upon payment of the debt and costs, could and ought to be set aside by the Court if the act was inconsistent with justice. That decision is very much in point in the present case. Although the parties have made their own agreement, it is still the duty of the Court to observe, respect, and carry out the direction in s. 10, and to presume that in this case the interest is excessive and the transaction harsh and unconscionable, until the contrary is proved. It cannot be that the sanction and authority of the Court must be given to a transaction prima facie harsh and unconscionable merely because the defendant has given his consent to the adoption of a particular course. The consent of the defendant is not of itself sufficient proof to the contrary to rebut the presumption with which in the circumstances specified in s. 10 the Court is directed to approach the case. The duty imposed upon the Court still remains notwithstanding any consent between the parties. The Court in s. 10 includes a Master or judge in Chambers acting within the Rules of Court, and the learned judge in this case was acting within his jurisdiction in holding that the consent of the defendant was not sufficient to rebut the presumption that the interest was excessive and the transaction harsh and unconscionable. The appeal must be dismissed.

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(1) (1845) 13 M. & W. 647, 649.

SCRUTTON L.J. I agree.

LAWRENCE L.J. I agree.

GREER L.J. I agree; but should like to add one word. I do not understand that by this appeal it is desired to establish that in every case where the interest charged exceeds forty-eight per cent. per annum the Master is bound to give leave to defend, although the defendant may for good and sufficient reasons have consented to judgment. If it were necessary to decide that point, I should like further time to consider it. But upon the facts of this case it cannot be said that the learned judge came to a wrong conclusion.

SLESSER and ROMER L.JJ. agreed with the judgment of the Master of the Rolls.

Appeal dismissed.

Solicitors for appellants: *Woolfe & Woolfe.*
For the Crown: *The Treasury Solicitor.*
Solicitors for the respondent: *Walker, Rowe & Clark.*

W. H. G.

PAYNE *v.* CARDIFF RURAL DISTRICT COUNCIL.

1931
June 25.

Local Government—Private Street Works—Charge on Frontager's Premises payable in Instalments—Instalments in Arrear—Right to exercise statutory Power of Sale—Private Street Works Act, 1892 (55 *&* 56 *Vict. c.* 57), *s.* 13—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *ss.* 101, 103.

The Law of Property Act, 1925, s. 101, provides: "A mortgagee, when the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):—(i.) A power, when the mortgage money has become due, to sell . . . . ":—

Held, that in a case where the mortgage money is made payable by instalments, the power of sale is exercisable when an instalment of the mortgage money has become due.

In 1926 street works were carried out by a local authority under the Private Street Works Act, 1892, and in 1927 a final apportionment was made of the cost of the work, as a result of which the defendant's leasehold premises became charged with a sum of 48*l.* 2*s.* 6*d.*, and an order was made for payment of this sum in seven instalments. By s. 13, sub-s. 1, of the Act the local authority was given the same powers and remedies under the Conveyancing Act, 1881 (now the Law of Property Act, 1925), or otherwise, as if they were mortgagees having powers of sale and leasing and of appointing a receiver.

Held, that after these instalments had become due, the local authority was entitled to sell the premises for the purpose of discharging the instalments in arrear with interest and costs.

Dicta of James and Brett L.JJ. in *Tottenham Local Board of Health* v. *Rowell* (1880) 15 Ch. D. 378, 392, 394 applied.

Appeal from the Cardiff County Court.

The facts in this case, which are fully stated in the judgment of Lord Hanworth M.R., were briefly as follows.

In 1926 the Cardiff Rural District Council carried out street works in Welwyn Road, Rhiwbina, near Cardiff, under the Private Street Works Act, 1892. On February 16, 1927, notice was given to the plaintiff, as the owner of a house called "Southdown" in that road, of a final apportionment made in pursuance of s. 12 of the Act of 1892 under which the plaintiff was shown as chargeable with the sum of 48*l.* 2*s.* 8*d.*; and as a result the premiums became charged under s. 13, sub-s. 1, of the Act with the payment of this sum, which by an order made under s. 257 of the Public Health Act, 1875, was payable in seven annual instalments.

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An objection to the apportionment was dismissed by the justices with costs, and on May 1, 1930, the Council demanded payment of the three instalments which had become due with interest at 5 per cent., making a total sum of 28*l*. 6*s*. 6*d*., and a sum of 5*l*. 14*s*., the costs of the objection to the final apportionment. The costs were ultimately paid, but on September 28, 1930, the Council brought proceedings under s. 14 of the Act to recover the instalments with interest. The justices made an order for payment of 28*l*. 13*s*. 11*d*. and 8*s*. 6*d*. costs, that amount to be paid by instalments of 3*l*. per month on the 22nd day of each month, the first payment to be made on October 22, 1930, and failure to pay an instalment on the due date to render the balance payable forthwith. Default was made in payment on October 22, 1930, and a distress warrant was returned marked "no effects."

In these circumstances the Council issued notices on December 3, 1930, advertising their intention to sell the plaintiff's house. On the same day the plaintiff's solicitors wrote offering to pay the sum of 28*l*. 13*s*. 11*d*. if on such payment the intended sale was abandoned. On December 4 the Council's solicitors replied that the Council would withdraw the instructions for sale on payment of the sum of 40*l*. 2*s*. 11*d*., made up of the above sum of 28*l*. 13*s*. 11*d*., 12*s*. 6*d*. costs of Police Court proceedings, 4*l*. estimated costs of advertising sale, 3*l*. 3*s*. surveyor's charges, and 3*l*. 13*s*. 6*d*. solicitor's charges.

On December 5, 1931, the plaintiff's solicitors wrote tendering 29*l*. 6*s*. 5*d*., being the sum of 28*l*. 13*s*. 11*d*. and the 12*s*. 6*d*. costs, and said: "Our client contends that the Council is not justified in offering his property for sale by auction without an order of the Court and for that reason the last three items in your . . . . letter should not be charged against him." The tender was refused, and on the same day the plaintiff commenced these proceedings for an injunction to restrain the Council their servants and agents from continuing to advertise the plaintiff's premises for sale by auction and damages. The county court judge said that s. 13 of the Private Street Works Act, 1892, provided that premises included in a final apportionment should stand and remain charged with the sum finally apportioned on them, and that the authority should have for the recovery of such sum and interest all the same powers and remedies under the Conveyancing Act, 1881, and otherwise as if they were mortgagees having powers of sale and leasing and of appointing a receiver. The power of sale conferred on them was that originally conferred by s. 19 of the Conveyancing Act, 1881, and now by the Law of Property Act, 1925, s. 101, which provided that a mortgagee should by virtue of the Act have the powers there mentioned to the like extent as if they had been in terms conferred by the mortgage deed but not further; and the particular power was "a power, when the mortgage money has become due, to sell." Here the sum charged was payable by instalments, and some only of the instalments had become due. He had come to the conclusion that the Council was not entitled to exercise the power of sale, as the whole mortgage money was not due at the time they sought to exercise it. He therefore granted an injunction as asked, and awarded 10*l.* 10*s.* damages.

The defendants appealed.

C. Erskine Simes and *Gwyn Rees* for the appellants. The county court judge was in error in holding that the power of sale conferred on the Council by s. 13, sub-s. 1, of the Private Street Works Act, 1892, only became exercisable when the whole sum charged was in arrears in a case when an order was made under s. 257 of the Public Health Act, 1875, making the sum payable in instalments. By s. 13, sub-s. 1, of the Act of 1892 the Council was given in regard to the charge "all the same powers and remedies under the Conveyancing and Law of Property Act, 1881, and otherwise as if they were mortgagees having powers of sale and lease and of appointing a receiver." Those powers are now contained in the Law of Property Act, 1925, which by s. 101 gives a mortgagee by deed "a power, when the mortgage money has become due, to sell. . . . ." If that power confers a power to sell when a part of the mortgage money has become due, the Council are in a position to sell, for one of the alternative conditions imposed by s. 103—namely, that "some interest under the mortgage is in arrear and unpaid for two months after becoming due" is satisfied. The whole question is whether the words "when the mortgage money has become due" in s. 101 make it a condition of the power of sale being exercisable that the whole mortgage money has become due in a case where it is made payable by instalments. The only case in which the effect of an order for payment by instalments has been considered is *Tottenham Local Board of Health* v. *Rowell* (1), where Brett L.J. discussed the position when the sum charged is made payable by instalments, and held that when instalments were in arrear the charge could be put in force for the instalments in arrear but not for the whole sum charged. It is only sought here to exercise the power of sale in respect of the instalments in arrear. If the Council are entitled to exercise the power of sale there has been no sufficient tender, and it is contended on the construction of s. 101 of the Act of 1925 that the power of sale could be exercised without waiting till the whole mortgage money was in arrears.

Kirkhouse Jenkins K.C. and *V. J. Lewis* for the respondent. The Council were at the earlier stages claiming to exercise their power of sale for the purpose of discharging the whole mortgage money. If this line had not been taken, it might well be that the respondent's attitude would have changed.

[LAWRENCE L.J. There was an offer to abandon the sale on payment of the instalments in arrear, interest, and costs.]

In any case the power of sale is under s. 101 of the Law of Property Act, 1925, only exercisable when "the mortgage money has become due," an expression which cannot be treated as meaning "the mortgage money or any part thereof has become due" in view of the reference in s. 103 to "the mortgage money, or . . . . part thereof." This is recognized in the precedent for a mortgage making the mortgage debt payable in instalments in The Encyclopædia of Forms and Precedents, vol. x., p. 87, and in other books of

(1) 15 Ch. D. 378.

precedents, for an express provision is inserted to enable the mortgagee to sell when an instalment is in arrear. It is true that in the case of an ordinary mortgagee the result of this construction of s. 101 is to leave him with no remedy when an instalment only is in arrear except to sue on the covenant. Here, however, the local authority is given an alternative remedy by the Act of 1892. In *Tottenham Local Board of Health* v. *Rowell* (1) it is not clear that the charge was payable by instalments, and the remarks of Brett L.J. relied upon are obiter dicta.

But even if the power of sale is exercisable, the Court will in its discretion prevent the Council from exercising it oppressively: *Jenkins* v. *Jones*. (2) The amount owing here is only a small fraction of the value of the property on which the Council has a first charge.

[No reply was called for.]

LORD HANWORTH M.R. (3) This appeal raises a point which is no doubt of importance in a number of cases, and the decision on which will be a guide to future practice. The facts were as follows. There were some works done upon a street by the Rural District Council of Cardiff. The plaintiff in the action, the respondent to the appeal, was a lessee of a portion of a frontage in Welwyn Road, where the street works were executed. When they were done, following out the procedure of the Street Acts, if I may so call them, there was an apportionment ordered to be made, and in 1927 the Committee approved the final apportionment, apportioning the expenses of the works among the owners of the frontages on the street. They also on February 7, 1927, made an order that the payment of the sum so apportioned should be by annual instalments, acting for that purpose under the powers given to them by s. 257 of the Public Health Act, 1875. On February 16, 1927, notice of the final apportionment was given to the plaintiff, and the charge to be made in respect of the apportioned sum was registered as a local charge under the Land Charges Act, 1925, s. 15, and under sub-s. 2 of that section, which made s. 11 applicable, the land charge took effect as if it had been created by a deed of charge by way of legal mortgage. The effect of that was that in respect of the sum of 48*l*. 2*s*. 8*d*. which had been apportioned as payable by the plaintiff, the Rural District Council became in effect mortgagees of his land with a frontage on Welwyn Road. No sum was paid, and there were some proceedings, to which I need not refer, which took place in consequence of an objection having been taken to the apportionment. The objection was taken on March 12, 1927, and the proceedings were in reference to the amount, but they really did not alter the true result of the position as between the parties, to which I have already referred. On May 30, 1930, there were three of these annual instalments outstanding and unpaid. A demand for them was made, but payment was not made. Thereupon on September 8, 1930, proceedings were taken to recover this sum before the justices under s. 14 of the Private Street Works Act, 1892, and an order was made on September 22, 1930, that there should be paid a sum of 28*l*. 13*s*. 11*d*., together with a sum of 8*s*. 6*d*. as costs, and a further order was made that payment should be by instalments of 3*l*. a month. The instalments again were not paid. On October 27, 1930, an application was made for a distress warrant, and a distress was put in upon the plaintiff's premises, but the return was that there were no effects. The plaintiff had adumbrated that that would be the result, because on July 5, 1930, he had written this letter: "I . . . . hereby give you notice that if you do cause a warrant to be issued, you will be held liable for damages and that action will be at once instituted. As you are aware when I received the Council's unauthorised demand for the alleged costs, I at once lodged formal objection to same two months later or two and a half months after the event, I received at the instigation of the Magistrates' Clerk, what was alleged to be, but was not in fact the Magistrates' Order and notice of objection was duly lodged with him under date of 18th June, and until this objection is disposed of you have no right to do as you suggest. Further I am still waiting to hear from the Magistrates' Clerk as to his explanation refusing my Notice of Appeal against the Magistrates' decision. I may say that if the warrant be issued it will be abortive as I have no effects to levy upon and a search for the month of September, 1923, will easily satisfy you as to this, not that same makes any difference to me with regard to any liability, as I am always ready and willing to pay whatever I owe, in this case however I claim not to owe the monies and until my case has been properly heard by a judicial Court and decision given against me, I shall still hold that view." I have read that letter because it makes it quite clear that in respect of this apportionment payable by instalments there had been an appeal which had been dismissed. There had also been a demand for payment, proceedings before the justices to recover the amount, which had proved unfruitful, and a distress warrant issued, which was again unfruitful; and it is clear from this letter that the parties were at arms length.

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(1) 15 Ch. D. 378.

(2) (1860) 2 Giff. 99, 106.

(3) Lord Hanworth M.R. and Lawrence L.J. were sitting as a Divisional Court.

The Committee, who look after the matter on behalf of the Rural District Council, are bound, of course, in the interests of the ratepayers, whom they represent, to see that a liability of this nature is fulfilled, and on November 28 the Committee recommended that they should enforce their rights by a sale under s. 13 of the Private Street Works Act of 1892. Sect. 13, sub-s. 1, provides as follows: "Any premises included in the final apportionment, and all estates and interests from time to time therein, shall stand and remain charged (to the like extent and effect as under s. 257 of the Public Health Act, 1875) with the sum finally apportioned on them, or if objection has been made against the final apportionment with the sum determined to be due as from the date of the final apportionment, with interest at the rate of four pounds per centum per annum, and the urban authority shall, for the recovery of such sum and interest, have all the same powers and remedies under the Conveyancing and Law of Property Act, 1881, and otherwise as if they were mortgagees having powers of sale and lease and of appointing a receiver." They were determined then to put in force those powers. The resolution so to do was approved on December 3. In the meantime, acting upon the instructions of the Committee, the matter had been put in train, so that when the action of the Committee was approved and ratified by the resolution on December 3, notices of the sale were at once posted up and published in the newspapers. On December 3 a letter was written by the solicitors for the plaintiff to the solicitors for the Rural District Council which says: "In accordance with such resolution your clients sued Mr. Payne at the Whitchurch Police Court in September last for the sum of 28*l.* 13*s.* 11*d.* We do not know whether any portion of this sum has been paid; if not we will arrange for payment forthwith of that sum upon hearing from you. As this is of vital importance to our client we should feel obliged if you would let us hear from you in reply forthwith." Now that sum, be it observed, is the amount of the three annual instalments plus a small sum for costs and interest. On December 4 the answer to that letter is written: "Our clients instruct us to state that provided all the costs and charges together with the private improvements and the interest are paid they will withdraw the instructions for sale. Particulars of the amounts are as follows: Three instalments due, 20*l.* 12*s.* 6*d.* Interest, 8*l.* 1*s.* 5*d.* Cost of police court proceedings, 12*s.* 6*d.*"—which made a total of 29*l.* 6*s.* 5*d.* "Estimated Costs of advertising sale, 4*l.* Messrs. R. H. Seel and Co.'s charges, 3*l.* 3*s.* Our charges, 3*l.* 13*s.* 6*d.*," which made a total of 40*l.* 2*s.* 11*d.* The rest of the letter shows that the question of the costs of advertising was capable of some adjustment. On December 5 this letter was written on behalf of the plaintiff: "We are in receipt of your letter of the 4th instant. We tender you herewith the sum of 29*l.* 6*s.* 5*d.* being the total of the first three items referred to in your said letter"—that is to say, the three instalments, interest, and cost of Police Court proceedings—"Our client contends that the Council is not justified in offering his property for sale by auction without an order of the Court and for that reason the last three items in your said letter should not be charges against him. As our client intends in any event to test the legality of the steps taken by your clients we shall be glad if you will let us know to-day whether your clients will withdraw the sale until after the trial of the action shortly to be commenced by our client, if not we must apply for an interim injunction in this action."

Mr. Kirkhouse Jenkins in his argument said that whatever was the actual position of the plaintiff, it was a case in which he was entitled to the consideration of the Rural District Council—perhaps I might describe it as the merciful consideration of the Rural District Council—and he cited to us the case of *Jenkins* v. *Jones*. (1) But the facts in that case were not the same as the facts in this case. A tender was made, but the letter of December 5 really is not a letter written on behalf of a penitent suppliant who is anxious to receive the mercy which his kindly acts entitled him to receive. The action was brought on January 6, 1931, and the plaintiff claimed 100*l*. as damages and asked for an injunction to restrain the sale. He got from the learned county court judge an interim injunction restraining the Cardiff Rural District Council from selling the property. On February 3 the learned county court judge delivered his judgment. He held that in the circumstances the conduct of the defendants had not been justified, and that the plaintiff had been put to some trouble and expense in consequence of the action of the authority in the exercise of their rights, and he awarded 10*l*. 10*s*. to the plaintiff. The learned county court judge decided the matter on this point: "In this case the point I have to direct myself to is when or whether the mortgage money had become due, and I have decided that in fact and in law it was not due." Judgment, therefore, was given for the plaintiff, and from that judgment the defendants appeal.

The short point we have to determine is this. It is not disputed that the apportionment had been made and that the sum to be paid was to be paid by annual instalments. When these proceedings were taken three instalments were unpaid, with a sum due for interest, and there was a total sum due in December to the Rural District Council of 29*l.* 6*s.* 5*d.*, and the question is whether or not the defendants had the right to proceed with the sale. The powers which were originally to be found in the Conveyancing Act, 1881, s. 15 and following sections, are now to be found in the Law of Property Act, 1925, and the particular section which gives the power to sell is s. 101, sub-s. 1, which runs as follows : "A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely) :—(i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof." There is a restriction on the exercise of that power to sell imposed by s. 103, which requires a notice to be served on the mortgagor in certain cases, but under sub-cl. 2 it is not required if some interest under the mortgage is in arrear and unpaid two months after becoming due. Now the interest which is claimed here is the interest which has accrued due in respect of the three instalments which ought to have been paid in the successive years after the apportionment had been made, in accordance with the terms of the apportionment and the order to pay by instalments. Therefore, there was at the date when these proceedings were taken for sale undoubtedly more than two months' interest in arrear. But it is said that having regard to the terms of s. 101 the mortgagees had no power to sell in respect of the part of the mortgage money due ; that what the section contemplates is that the power of sale shall only arise when the whole of the mortgage money is due—a sum in this case of over 48*l.*—so that the Rural District Council had no right to exercise the power of sale conferred by s. 13 of the Act of 1892. In a few words the point we have got to decide is whether, where three instalments of the mortgage money had become due and not the whole, the mortgagees had power to sell. I find it impossible to attribute to the words which I have read a negation of the right to sell where the whole of the mortgage money has not become due. We are to treat the power to sell as if it had been one of the terms conferred by the mortgage deed. It is really admitted that if there is no power to proceed to a sale in respect of the instalments due and unpaid, and if the rights of the mortgagee are postponed until such time as the total mortgage debt has become due, the mortgagee has no power to exercise any of the rights of a mortgagee in the interval. That would be an unfortunate and almost grotesque result. It seems quite clear that the purpose of the words of s. 101 of the Act of 1925 is not to cut down a mortgagee's rights, but, just as in precedents providing for payment by instalments to which our attention has been called, if power is given to pay by instalments, so also there is power to sell when any instalment of the mortgage money has become due in the manner provided for in the mortgage deed. In the circumstances of this case the mortgage money was to be paid just as if in a mortgage deed the mortgagor had covenanted to pay it by instalments, and the right, therefore, of the Rural District Council to proceed seems to be established.

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(1) 2 Giff. 99.

Our attention was also called to s. 103, sub-s. 1, of the Law of Property Act, 1925, which says: "A mortgagee shall not exercise the power of sale conferred by this Act unless and until—(i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof. . . . ." It is said that by contrast the fair inference is that s. 101 dealt only with the total mortgage debt, whereas s. 103 specifically refers to default in payment of a part thereof. I do not draw such an inference. It seems to me that s. 103 was intended to make a notice necessary not only where there had been a default in payment of the total sum, but also where there had been a default in payment of part of the mortgage debt. Therefore, consideration of that sub-section confirms the view that s. 101 confers a power of sale not only when the total debt is due but also when a part only is due in cases where the debt is to be paid by instalments. There is really no authority on the point, but it may be useful to read part of the judgment of Brett L.J. in *Tottenham Local Board of Health* v. *Rowell.* (1) Brett L.J. seems to contemplate cases where the payment has to be made by instalments. He says (2): "So that, if the sum had been made payable by instalments in fifteen years, and the payments were in arrear for seven years, then if the charge were attempted to be put into force, it could only at the end of those seven years be put into force for the seven years' instalments in arrear, and then, if afterwards further instalments became in arrear, it must be put into force again." I am inclined to think those words are obiter, but they are at any rate observations made by a learned judge on a situation not very far different from the present, and they seem to contemplate the possibility of a mortgagee exercising his rights in respect of such instalments as had at the time accrued due.

For these reasons, therefore, I think the plaintiff's action was misconceived, and that he was not entitled to have an injunction to restrain the sale. On the other hand, the Rural District Council were entitled to proceed with the sale for the purpose of recouping themselves in respect of the instalments with interest thereon which had accrued due. The result is that this appeal must be allowed, the judgment of the learned county court judge must be reversed, and there must be judgment in the action for the defendants, with costs.

LAWRENCE L.J. I agree. The substantial question on this appeal is whether the appellants were justified in putting up the property for sale in December last. The answer to this question, in my judgment, depends upon whether at that date the mortgage money under the charge had become due within the meaning of s. 101, sub-s. 1 (i.), of the Law of Property Act, 1925. If it had become so due, it is not disputed that the appellants had the power to sell the property without

(1) 15 Ch. D. 378.

(2) 15 Ch. D. 394.

first giving the notice provided for by s. 103, as the interest was more than two months in arrear. The main contention by Mr. Kirkhouse Jenkins was that the power of sale conferred by s. 101 had not arisen and could not arise unless and until default had been made in payment of all the instalments payable under the charge. In my opinion that contention is not well founded. I agree with the opinions expressed on this subject by James and Brett L.JJ. in *Tottenham Local Board of Health* v. *Rowell.* (1) James L.J. said (2): "The only effect, according to my view of that, would be that the charge could not be enforceable as long as the annual instalments were paid, but would only be enforceable after the instalments had fallen into arrear." Brett L.J., after stating that the Act imposed a charge on the premises immediately the expenses had been incurred and that there was no limitation of time during which that charge was to remain effective, said (3): "Where the payment has come to be a payment by instalments, then I think that if the charge is to be made effective, it could only be made effective for instalments in arrear. So that, if the sum had been made payable by instalments in fifteen years, and the payments were in arrear for seven years, then if the charge were attempted to be put into force, it could only at the end of those seven years be put into force for the seven years' instalments in arrear." In my judgment, whenever in a case of such a charge the money payable under it has been ordered to be paid by instalments, then in default of the payment of an instalment the power of sale under s. 101 arises in respect of that instalment, which, in my opinion, is the mortgage money that has become due according to the tenor of the charge within the meaning of s. 101.

Now the only other contention urged by Mr. Kirkhouse Jenkins in opposition to this appeal was that in the present case there had been a sufficient tender by his client to prevent the exercise of the power of sale. That contention is, in my judgment, met by the fact that the tender was not made until after the expenses of putting the property up for sale had been incurred and it was only for an amount sufficient to cover the instalments in arrear, the interest due at that date, and a small sum for the costs, but did not include the expenses incurred by the appellants in putting the property up for sale. In these circumstances, the tender was insufficient, and the appellants were entitled to proceed with the sale.

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(1) 15 Ch. D. 378.

(2) 15 Ch. D. 392.

(3) 15 Ch. D. 394.

For these reasons I agree that this appeal succeeds and ought to be allowed.

Appeal allowed.

Solicitors: *J. M. Napier, for C. James Hardwicke & Co., Cardiff; D. J. Davies & Son, Cardiff.*

H. C. G.

1931
July 21.

ESHELBY *v.* FEDERATED EUROPEAN BANK, LIMITED. (1)

Contract—Principal and Surety—Work not completed—Guarantee—Discharge of Surety—Practice—Amendment of Claim—No Cause of Action at Date of Writ—Rules of the Supreme Court, Order XXVIII., *rr.* 1, 12.

By contract under seal dated August 28, 1930, the plaintiff agreed with the owners of a club house in Soho to carry out certain alterations and repairs for the sum of 1500*l*., to be paid in four equal instalments of 375*l*. on October 22, 1930, January 15, 1931, April 15, 1931, and July 15, 1931, subject to the works being duly executed, and the defendants agreed that upon any default in payment, written notice of which should be given by the plaintiff to the defendants within six days, the defendants would themselves make the payment so in default to the plaintiff. The proprietors did not pay the first instalment when due. No notice of default was given by the plaintiff to the defendants, but on November 27, 1930, the plaintiff issued a writ against the defendants for the amount of the first instalment. The action came before the official referee on March 16, 1931, and he then gave leave to the plaintiff to amend his claim by adding the amount of the second instalment, which fell due on January 15, 1931, and was still unpaid. Acting on the report of a surveyor, the referee found that at the date of the writ it was necessary to spend 80*l*. on the premises to put them into the condition required by the contract, but subject to this deduction he gave judgment for the plaintiff for the amounts claimed. The defendants appealed :—

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(1) Affirmed in C. A. [1931] W. N. 244.

Held, that the amendment was not justified, inasmuch as it admitted a new cause of action which did not exist at the date of issue of the writ.

Held also, that the work contracted for had not been duly executed in accordance with the agreement, and that as due execution was a condition precedent to the defendants' liability, they were not liable thereunder to the plaintiff as guarantors.

H. Dakin & Co., Ld. v. *Lee* [1916] 1 K. B. 566 distinguished.

APPEAL from the judgment of an official referee.

In August, 1930, a company known as Olympus, Ld., wished to open a night club at 1 Sutton Place, Soho Square, W. In order to make the premises attractive as a night club, this company desired that works of alteration and decoration should be carried out, and they approached the plaintiff, John Eshelby, a building contractor of 6 New Burlington Street, W., for the purpose. Olympus, Ld., was a company controlled by one Taglioni, with whom the plaintiff had had previous dealings, and by the defendants, the Federated European Bank, Ld., which had its offices in the same building. Taglioni, the defendants, and Olympus, Ld., were, as the official referee afterwards found, joint adventurers in the undertaking, and it appeared from the evidence that the plaintiff was also one of the joint adventurers. Accordingly, Olympus, Ld., Taglioni, the defendants and the plaintiff entered into an agreement under seal dated August 28, 1930, which provided that the plaintiff should do the alterations, decoration, etc., at 1 Sutton Place, Soho Square, described in the specification annexed to the agreement, for the sum of 1500*l.* By clause 2 thereof this sum was to be paid to the contractor in four instalments, as to 375*l.* on October 22, 1930, as to 375*l.* on January 15, 1931, and the other two instalments at subsequent dates.

By clause 11 thereof Taglioni agreed that " In consideration of the contractor and of the Bank at the request of the guarantor severally entering into this agreement, the guarantor hereby agrees with the contractor and by way of separate agreement hereby agrees with the Bank and undertakes as follows, that is to say : (*a*) That the company shall subject to the said works being duly executed in accordance with this agreement, duly and punctually make to the contractor the payments prescribed by clause 2 hereof, and that upon any default for three days or more on the part of the company (written notice of which shall be given by the contractor to the guarantor within six days of such default) in making any payment on the prescribed date he the guarantor will himself immediately make the payment so in default to the contractor." Clause 11 (*b*) provided: "The obligation of the guarantor under this clause is to be a continuing obligation," and (clause 12): "In consideration of the premises the Bank hereby agrees and undertakes with the contractor that upon any default for three days or more (written notice of which shall be given to the Bank by the contractor within three days of such default) on the part of the guarantor in making any payment under paragraph (*a*) of clause 11 hereof the Bank itself will immediately make the payment so in default to the contractor provided this contract has not been determined by the Company." A similar contract under seal was entered into between the same parties dated September 8, 1930, the contract providing for the payment of a sum of 385*l.* 4*s.* by four quarterly instalments of 96*l.* 6*s.*, and the defendants agreeing to guarantee these payments on terms similar to those of the agreement of August 28, 1930.

On October 22, 1930, Olympus, Ld., was unable to pay the instalments due under the agreements. The plaintiff had previously written to Taglioni asking him to make arrangements for the payment to him of 471*l.* 6*s.* Taglioni replied that he should not pay, as he was having a dispute with the Bank on the ground that the representatives of the Bank had fraudulently induced him to enter into the agreements. The instalments not being paid, the plaintiff issued the writ in this action, dated November 27, 1930.

By this writ, which was specially indorsed, the plaintiff claimed, as against the defendants, 471*l.* 6*s.* for work done and materials supplied to Olympus, Ld., in accordance with specifications annexed to the two guarantees under seal

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aforesaid. This sum was composed, as to 375*l.*, of the first instalment due under the guarantee of August 28, 1930, and as to 96*l.* 6*s.*, of the first instalment due under the guarantee of September 8, 1930. The action came on for trial before an official referee on March 16, 1931. After the hearing had begun the official referee, acting on his own initiative, allowed the plaintiff to amend and add to his claim the amount of the second instalment, which fell due on January 15, 1931, observing that there was no need to bring a new action for this amount, and that he wished to deal with both items at once.

After hearing expert evidence on the point, the official referee found that at the date of the issue of the writ it was necessary to spend 80*l.* in order to complete the work in accordance with the contract. He therefore deducted this amount, and he gave judgment for the plaintiff for 862*l.* 12*s.* and costs.

The defendants appealed from this decision on the following grounds (inter alia): (1.) That the official referee had no jurisdiction to allow an amendment of the statement of claim adding a claim which had arisen after the date when the action was begun; (2.) that the defendants were not liable at all under the guarantees, the work not having been duly executed under the contract; and (3.) that there was a condition precedent that written notice of default in payment of instalments should be given to the defendants by the plaintiff under the agreements within three days of such default, and that no such notice had been given.

du Parcq K.C. and *Joseph Baker* for the defendants. The amendment to the claim should not have been allowed, as it related to a cause of action which did not exist at the date when the writ was issued: *Tottenham Local Board of Health* v. *Lea Conservancy Board* (1); *Creed* v. *Creed.* (2)

As to the question whether the plaintiff is entitled to succeed generally, there is no obligation upon the defendants to pay until the completion of the contract. There is an entire contract here, and even if the contract was completed it was not duly executed, because, as the official referee has found, 80*l.* would have to be spent upon the premises to execute the contract and comply with the specification. The case here differs in this sense from *H. Dakin & Co., Ld.* v. *Lee* (1), in which the builder completed the work, but did it negligently, and was able to recover, subject to a deduction for breach of warranty. Here, the work not having been duly executed, the condition upon which the guarantor became liable was not fulfilled. Finally, notice of the principal's default was not given by the plaintiff to the defendants, as required by the contract, and the giving of notice was a condition precedent to liability.

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(1) (1886) 2 Times L. R. 410.

(2) [1913] 1 I. R. 48.

Viscount Erleigh K.C. and *Alan Bell* for the plaintiff. The amendment allowed by the official referee was within the terms of R. S. C., Order XXVIII., r. 1, and is valid.

As to the main question, *H. Dakin & Co., Ld.* v. *Lee* (1) is on all fours with the present case. There is no distinction between execution of the work and performance of the contract itself. The work was substantially completed and the contract duly performed, subject to a deduction for any particular work which might be found to be defective.

Notice of default is not a condition precedent to the guarantor's liability, and failure to give such notice does not render the contract void: *Gordon* v. *Rae.* (2) There is no rule of law now, even if such formerly was the case, that contracts of guarantee should be construed in favour of the guarantor: Rowlatt on Principal and Surety, 2nd ed., p. 59.

SWIFT J. [after stating the facts and points in dispute between the parties, continued:] There is a great deal to be said for the view expressed by the official referee, but in my opinion he had no power to make the amendment to the claim. When an action has begun the Court has, at all its stages until it is finally determined, ample powers of amendment, and it is the duty of the Court to exercise those powers. The Rules of the Supreme Court provide in Order XXVIII.,

(1) [1916] 1 K. B. 566.

(2) (1858) 8 E. & B. 1065; 27 L. J. (Q. B.) 185.

r. 1: "The Court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." By r. 12 of that Order: "The Court or a judge may at any time, and on such terms as to costs or otherwise as the Court or judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings." In some cases neither party has a very clear and definite view of the real position until the witnesses have been examined and cross-examined, and documents have been criticized in open Court. If the true points at issue are to be determined, and real justice to be done, the pleadings should not be too rigidly adhered to, and the Court should make such amendments as are necessary in the proceedings for the real rights of the parties to be determined. But here the learned official referee seems to me to have gone much further than amending the proceedings. He has allowed the plaintiff to bring into this action an entirely fresh cause of action, arising after this action had been started, and he has done that without the consent of the defendants. In *Tottenham Local Board of Health* v. *Lea Conservancy Board* (1), an action brought to restrain the Lea Conservancy Board from stopping the outlet of the effluents from the sewage works of the plaintiff Board into the River Lea, it was sought to amend the statement of claim by stating facts relating to some proposed new works, and adding an alternative claim for injunction to restrain the Lea Conservancy Board from interfering until it should be ascertained whether the proposed new works were efficient; Pearson J. refused the application, and from that there was an appeal. Cotton L.J. said he would give no opinion whether the Court had power to allow the proposed amendment, but that if there were power he thought it ought not to be exercised in the circumstances of

(1) 2 Times L. R. 410.

that case. Bowen L.J. said that it was not necessary to decide the point, but he had a very strong opinion that the amendment could not be allowed, inasmuch as it related to a cause of action which did not exist at the time when the writ was issued. Fry L.J. did not express any opinion upon the matter at all. So far as I know, Bowen L.J.'s remarks in that case are the only authority which is to be found in this country, with the exception of an observation of Sir George Jessel in a case to which I will immediately allude, upon the point whether or not a writ can be amended so as to include a cause of action which was not in existence at the time when the writ was issued. I can find nothing in the Rules which justifies such an amendment. To bring in such a cause of action does not seem to me to be amending the proceedings at all; it admits a new cause of action, and one which could not have been sued upon at the time the writ was issued. An Irish case, *Creed* v. *Creed* (1), seems directly to decide that such an amendment cannot be made. The headnote is that " A. B. believing that X. died intestate, took out administration intestate to him, and commenced an action as such administrator against C. D. C. D., who had been aware that X. left a will, appointing him executor, declared that fact for the first time in his defence, and thereupon A. B. took out administration with the will annexed (C. D. having renounced) and sought to amend the pleadings accordingly. *Held*, that A. B.'s application must be refused, as at the date of the issue of the writ she had no title to sue." Barton J. said: " I am of opinion that this summons should be dismissed with costs, as the plaintiff's letters of administration were void ab initio; and she had no title to sue when the action was brought." Here there was no right on the part of the plaintiff in this action to sue for that second instalment when the action was brought, and *Creed* v. *Creed* (1) is helpful in the absence of any express rule on the matter in our own Courts or in our own Rules of procedure, as showing that such a cause of action cannot be added to the writ here.

(1) [1913] 1 I. R. 48, 50.

The judgment of Sir George Jessel, to which I referred, was given in *Original Hartlepool Collieries Co.* v. *Gibb.* (1) He says: "Where a plaintiff issues a writ for damages he claims damages up to the time of issuing his writ, and where the defendant brings a counterclaim for damages it is his statement of claim in the same action, and that is up to the issuing of the writ; and, as far as I can see, it being a cross claim and not a defence to the original claim, there is no reason why, if he adopts the plaintiffs' writ, he should go beyond the issuing of the writ for damages, because that would not be justice. If the defendant can get damages in respect of another matter up to the date of his counterclaim, the plaintiff ought to have the same right so as to increase his damages, to do justice. If it is a continuous act, injuring the plaintiff, and the plaintiff says, 'I am entitled to 500*l.* damages up to my writ and 500*l.* more to the time of your putting in your counterclaim,' and the defendant says, 'I am entitled to 600*l.* damages subsequently to the issuing of the writ,' he would get a verdict for 100*l.*; although the plaintiff is entitled to the 500*l.* damages he is estopped and the other is not. That does not seem to be consistent with justice. When I come to look at Order xx., I find it relates to 'Pleading matters arising pending the action.' If it was intended that the counterclaim should include matters pending the action, it would have said so; but I find it is carefully restricted by r. 1: 'Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be pleaded by the defendant in his statement of defence, either alone or together with other grounds of defence. And if, after a statement of defence has been delivered, any ground of defence arises to any set-off or counterclaim alleged therein by the defendant, it may be pleaded by the plaintiff in his reply, either alone or together with any other ground of reply.' So that it is carefully restricted to defence, either to an action or to a counterclaim. The only way that I can see in which you could allege a counterclaim for matters up to its date would be by saying that the counterclaim was a defence; but that is not the way it is treated throughout the rules. It is always treated as a cross-action, not as a defence but a true cross-action; the rule being that you must set off damages in the cross-action against the damages in the first action. It seems to me, therefore, that you cannot bring your counterclaim for damages which accrued after the writ." So far, the words of the learned Master of the Rolls are, if I may say so, entirely in accordance with what has been in my mind throughout this case. Then he makes this observation (1): "By the leave of the Court you can do anything. That is another matter; because the Court can give leave to amend on both sides, and can easily amend the writ." There I respectfully differ. It is not correct to say, "By leave of the Court you can do anything." It is certain that by leave of the Court you cannot do everything. The Court is limited in giving its leave to the powers which are conferred upon it by the Rules and by the statute under which those Rules are made, and I cannot see how, without the consent of the parties, the Court can so amend a writ as completely to change the cause of action so as to bring in a cause of action which was non-existent at the time the writ was originally issued. The learned Master of the Rolls said: "The Court can . . . . easily amend the writ." If it can, the Court has not done it in this particular case. The Court has amended the statement of claim which is endorsed upon the writ, but it has not amended the writ itself; and, indeed, it could not have done so, because in order to make this action on the second instalment one which would come within the writ, the date of the writ would have had to be altered from November 27, 1930, upon which it was issued and soon after which it was served, up to some date after January 15, 1931. I do not think the Court could possibly alter the writ in that way. It could not make an amendment to say that the writ had

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(1) (1877) 5 Ch. D. 713, 718. This case was not followed by Fry J. in *Beddall* v. *Maitland* (1881) 17 Ch. D. 174.

(1) 5 Ch. D. 719.

not been issued until some date after January 15, 1931. It seems to me, therefore, that this amendment never ought to have been made and that this judgment, so far as it is for more than the 471*l.* 6*s.* which was originally claimed, is bad and must be set aside.

Then comes the question whether or no anything is proved to be due from these defendants to the plaintiff, and that takes us to a consideration of the contract which was entered into between the parties in this case. It is a curious contract. It is by no means so clear as the plaintiff seems at one time to have thought, and in order to understand it at all, one must realize the position of the various parties to it. [His Lordship reviewed the facts, and after reading clauses 11 and 12 of the agreement continued :] Two points were taken with regard to the liability of the Bank for this 471*l.* 6*s.* It is said, firstly, that no liability has arisen, because it is a condition precedent to any liability on the part of either Mr. Taglioni or the Bank that the work shall have been duly executed in accordance with the agreement, and it is said that the works have not been duly executed in accordance with the agreement. About that matter there was considerable dispute before the learned official referee. In the course of the trial, the official referee appointed an expert, an architect and surveyor, to go and inspect the work which had been done, to consider the contract and the specification, and to assist him by reporting as to whether or no the work had been properly done. In the result the expert gentleman reported that the work had not been completely or properly done, and that in order to complete the work under the contract a sum of 100*l.* was necessary. The learned official referee reduced this amount to 80*l.* It is quite clear on the finding of the learned official referee that at the time of the issue of this writ, in order that the work might be duly executed within the meaning of the contract and so as to comply with the specification attached to the contract, a sum of 80*l.* had to be paid, and it was therefore said by the defendants that no liability upon their part arose, because the works had not been duly executed

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in accordance with the agreement, as required by clause 11 (*a*) thereof. In answer to that, Lord Erleigh has called our attention to *H. Dakin & Co., Ld.* v. *Lee* (1), and we have considered that case very fully, and have derived very considerable assistance from the arguments of counsel based upon it. The headnote is: "Where a builder has supplied work and labour for the erection or repair of a house under a lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services, unless (1.) the work that he has done has been of no benefit to the owner; (2.) the work he has done is entirely different from the work which he has contracted to do; or (3.) he has abandoned the work and left it unfinished." In the Court of Appeal, Lord Cozens-Hardy M.R. said: "I regard the present case as one of negligence and bad workmanship, and not as a case where there has been an omission of any one of the items in the specification. The builders thought apparently, or so they have sworn, that they had done all that was intended to be done in reference to the contract; and I suppose the defects are due to carelessness on the part of some of the workmen or of the foreman: but the existence of these defects does not amount to a refusal by them to perform part of the contract; it simply shows negligence in the way in which they have done the work. Thus, in regard to the rolled steel joists they have not apparently bolted them together in some particular way, the precise nature of which I confess I do not understand. Then what is the result? It seems to me that the result is that the builders are entitled to recover the contract price, less so much as it is found ought to be allowed in respect of the items which the official referee has found to be defective." Pickford L.J. said (2): "We have been told that if we affirm this judgment we shall be upsetting all the cases which have ever been decided in regard to contracts made for payment of a lump sum. To my mind our decision does not interfere with any one of them. Certainly I have not the slightest wish to differ from the view that if a man agrees to do a certain amount of work for a lump sum and only does part of it he cannot sue for the lump sum; but I cannot accept the proposition that if a man agrees to do a certain amount of work for a lump sum every breach which he makes of that contract by doing his work badly, or by omitting some small portion of it, is an abandonment of his contract, or is only a performance of part of his contract, so that he cannot be paid his lump sum. It seems to me that there would be a performance of the contract, although some part of it was done badly, and that seems to me to be the position here. Here there was a contract to do a considerable amount of work to the defendant's house for the price of 264*l.* I do not understand whether the official referee's finding about the columns was a serious matter or a mere matter of detail; but the matters with which we are mainly concerned here are the concrete work in the underpinning of the side elevation, and the rolled steel joists, which are part of the work on the front elevation. According to a calculation made by the plaintiffs before they sent in their estimate the costs of these items were estimated, so far as the concreting went, at 60*l.*, and as regards the other item at 70*l.*, so that, although they were a substantial part of the work in the specification, they were not by any means the whole of the work which had to be done under it. The official referee has found, with regard to the rolled steel joists, that they were 'to be side by side, cleated at angles and bolted to caps and to each other.'"

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(1) [1916] 1 K. B. 566, 579.

(2) [1916] 1 K. B. 580.

Then Pickford L.J. deals with the manner in which the plaintiffs had carried out the work, and concludes (1): "There is nothing in all this that seems to me to amount to doing only a part of the work contracted for and abandoning the rest. What the plaintiffs have done is to perform the work which they had contracted to do, but they have done some part of it insufficiently and badly; and that does not disentitle them to be paid, but it does entitle the defendant to deduct such an amount as is sufficient to put that insufficiently done work into the condition in which it ought to have been

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(1) [1916] 1 K. B. 581.

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according to the contract." Now I accept, as I am bound to do, with the fullest possible assent, those propositions of law laid down by Lord Cozens-Hardy M.R. and Pickford L.J., but they do not seem to me to conclude the case which we have to consider and decide to-day. The question here is not between a contractor and a building owner. It is not a question as to whether a building owner who has got 95 per cent. of the work which he contracted to get, but who has been deprived of 5 per cent. of it and is entitled to some allowance to make good that 5 per cent., it is not a question whether he ought to pay for the 95 per cent. which he has done; the question here is whether a condition precedent to a contract of a guarantor has been complied with. Before the defendants in this case can be made liable upon this guarantee, the works contracted for have to be duly executed in accordance with the agreements. I do not see that a guarantor stands in any better position than any other contractor, and I do not see that this contract is to be construed in any different way from any other contract. There is no doubt language in the cases which would justify one in thinking that he did stand in a different position. It is stated in Rowlatt on Principal and Surety, 2nd ed., p. 59: "It was said by Bayley B. in *Nicholson* v. *Paget* (1) that guarantees were to be construed favourably to the guarantor. This dictum, which was contrary to the ruling in earlier cases, has been since disapproved, and it is now settled that guarantees are not to be construed more strictly than other contracts." I accept that, nevertheless it is to be construed with reasonable and proper strictness, as every other contract has to be construed, and I find (and I think it is still good law) that in *Blest* v. *Brown* (2) the Lord Chancellor, Lord Westbury, said: "It must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely

(1) (1832) 1 C. & M. 48, 52; 2 L. J. (Ex.) 18.
(2) (1862) 4 De G. F. & J. 367, 376.

according to the proper meaning and effect of the written engagement that he has entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say, 'The contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation, therefore, is at an end.' Now, I construe this engagement to be an engagement to be answerable for flour supplied in conformity with the requisitions of this contract. Then I ask de facto was any flour supplied to Millar in conformity with the requisitions of the contract? The answer of the defendants themselves is an admission that none such was supplied. The conclusion is plain, therefore, that no legal obligation, as far as the surety is concerned, arises upon what has been done under this contract so construed, as I hold it ought to be construed, and as involving the representation that I have stated."

I think that holding the guarantor here to the strict letter of his engagement, he is bound only if it is proved that the work has been duly executed in accordance with the agreement. It may well be that so much work has been properly done, that as between the contractor and the building owner, the contractor is entitled to say: "Deduct something for my negligence, or my defective work, and pay me the balance, for I have in substance performed my contract." It is not a question here whether the contractor has performed his contract or not; the question is, had the works been duly executed within the meaning of the agreement? When the contractor has to come and say: "At the time I issued my writ claiming 471*l.* 6*s.* from the defendants, I still have left undone 80*l.* worth of work," it seems to me he cannot say that the condition upon which the guarantor was to be bound has been fulfilled. In those circumstances, it appears to me to be clear that judgment should have been given for the defendants upon the claim for the instalment of 471*l.*

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[His Lordship then considered the question whether the giving of notice was a condition precedent to liability. Upon this he was of opinion that the objection which was taken with regard to the notice was fatal: but that it was not necessary to decide that point, because the plaintiff had failed to show that the work had been duly executed. He held therefore that the plaintiff had no claim against the defendants, and that the appeal must be allowed.]

CHARLES J. [after stating the facts, continued:] The first point which has been discussed arose during the continuance of this hearing by the official referee. The statement of claim, according to the indorsement upon it, is said to be "amended by leave of the official referee." In truth and in fact it was amended at his instigation, in spite of the protests made on behalf of the defendants, who wanted no such amendment. By March, 1931, the second instalment had become due, and so he said that he would try the case as though the two instalments were due at the date of the writ; but they were not so due, and the amendment therefore related to a cause of action which did not exist at the date when the writ was issued. It has been argued that he had power to do this, but in *Tottenham Local Board of Health* v. *Lea Conservancy Board* (1) Bowen L.J., as he then was, said the Court was clear as to the impropriety of amendments of this sort being made, and he said he had a "very strong opinion that the amendment should not be allowed, inasmuch as it related to a cause of action which did not exist at the time when the writ was issued." There are other authorities referred to by my Lord which point in the same direction, and, indeed, in the Rules there is nothing to warrant such an amendment being made. In my view the amendment was wrongly made. The learned official referee had no power to make such an amendment at all, and therefore, as to the 471*l.* 6*s.* which was the amount added by the amendment, judgment should be for the defendants.

The second point also raises matters of importance. The defendants, by this agreement to which I have referred, became the second guarantors, and their guarantee is governed by clause 11 and clause 12 of the agreement. Clause 11 (*a*) provides as follows: "(*a*) That the Company shall (subject to the said works being duly executed in accordance with this agreement) duly and punctually make to the contractor the payments prescribed by clause 2 hereof and that upon any default for three days or more on the part of the Company (written notice of which shall be given by the contractor to the guarantor within six days of such default) in making any payment on the prescribed date he the guarantor will himself immediately make the payment so in default to the contractor." The clause directly refers to the debtor Taglioni, but by clause 12 of the agreement the Bank guarantees that if Taglioni makes default under certain conditions of notice, the Bank will itself immediately make the payment so in default to the contractor, provided the contract has not been determined by the company. It is said by Mr. du Parcq for the defendants: "The contract never has been duly executed and so our liability under the guarantee clause does not arise and never has yet arisen." This is answered by Lord Erleigh on behalf of the plaintiff by citing *H. Dakin & Co., Ld.* v. *Lee.* (1) In my view that case only comes to this: If a building owner enters into a contract with a builder and the builder substantially performs his contract, then the building owner is liable for the contract price; but if, although the building has been substantially completed, it is found that there are certain measurable defects, then the building owner is liable for the contract price, less the amount of the measurable defects. But if it be found that there are such defects, it appears to me to be impossible as regards the guarantor to say that the contract has been duly executed. It has been substantially performed as regards the builder, but not duly executed as regards the guarantor, because it would be a contradiction in terms to say that the contract had been duly executed, and almost in the same breath to say that it requires another 100*l.* to be spent upon it. In this case there was 100*l.*, as found by the surveyor, and 80*l.*, as found by the official referee himself, still

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(1) 2 Times L. R. 410.

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(1) [1916] 1 K. B. 566.

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to be spent on this house in March, 1931, in order to put it into proper condition. That was the amount which had still to be spent on the house under the agreement between the parties at the date of the issue of the writ. In my view, therefore, there was no due execution of the work in accordance with the agreement, so as to bring into operation the guarantee clauses, by which it is sought to bind the defendants. That being so, I agree that judgment should have been entered for the defendants upon the whole claim.

[Upon the question of notice, his Lordship said that he was satisfied that the notices were never given in accordance with the agreement. This fact, in itself, would be fatal to the plaintiff's claim, but he decided all three points in favour of the defendants.]

Appeal allowed.

Solicitors for defendants: *Arram, Fairfield & Co.*
Solicitors for plaintiff: *Steadman, Van Praagh & Gaylor.*

F. P. F.

ANDERTON AND HALSTEAD, LIMITED v. BIRRELL (INSPECTOR OF TAXES).

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June 2, 16.

Revenue—Income Tax—Additional First Assessment—Doubtful Debt—"Estimated to be bad"—Allowance—Subsequent disallowance—Discovery of undercharge—"If the surveyor discovers"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 125, *sub-s.* 1; *Sch. D, Cases I. and II., r.* 3 (*i.*).

By s. 125, sub-s. 1, of the Income Tax Act, 1918: "If the surveyor discovers . . . . that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement, or relief not authorised by this Act, then and in every such case . . . . (ii.) where the tax is chargeable under Schedule D, the additional commissioners shall make an assessment, on the person chargeable, in an additional first assessment . . . .":—

Held, that the word "discovers" does not mean a mere change of opinion on the same facts and figures. To justify an additional assessment the surveyor must ascertain some new fact which, if it had been known when the original assessment was made, would have resulted in an increased assessment.

By r. 3 of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918: "In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of . . . . (i.) any debts, except bad debts proved to be such to the satisfaction of the commissioners and doubtful debts to the extent that they are respectively estimated to be bad . . . ."

What the statute requires is an estimate of the extent to which a debt is bad for a profit and loss account. Such an estimate is not a prophecy to be judged by after events, but a valuation of the debt as an asset, to be judged as an estimate on the existing facts and probabilities.

The appellants were assessed under Sch. D for the years 1921–22 and 1922–23 on the basis of a writing down in two years successively of a doubtful debt. That was done by agreement with the inspector of taxes, who had all the facts before him. Subsequently, by additional first assessments, the writing down of the doubtful debt was disallowed, on the ground that since the writing down of the debt was allowed, it had come to the surveyor's knowledge that the appellants had permitted the debtors to increase their indebtedness to them. On an appeal against the additional first assessments, the General Commissioners were not satisfied that the debt or any part of it had been proved to be a bad debt within the meaning of r. 3 (i.) of Cases I. and II. of Sch. D, and they confirmed the additional first assessments:—

Held, that the General Commissioners had not considered the right question. The question which they ought to have considered and decided was whether there had been a "discovery" by the surveyor within the meaning of s. 125 of the Income Tax Act, 1918. If they had considered that question there was no evidence which would have supported a decision in favour of the inspector of taxes.

Held, also, that an estimate of the value of a debt made in 1923 and 1924 on the then facts and probabilities was not overthrown by a finding of the General Commissioners that in 1930 it had not been proved that the debt or any part of it was a bad debt within the meaning of the rule.

CASE stated under the Income Tax Act, 1918, by the Commissioners for the General Purposes of the Income Tax Acts for the Blackburn Division.

Anderton & Halstead, Ld. (hereinafter called the " appellant company "), appealed against the following additional assessments made on them under Sch. D by the Additional Commissioners of Income Tax :—

1922–23	6449*l.*
1923–24	6448*l.*
1924–25	7738*l.*
1925–26	1290*l.*
1926–27	1289*l.*

The question before the General Commissioners was whether a sum of 29,019*l.* 12*s.* 6*d.*, or any part thereof, was a bad debt within the meaning of r. 3 (i.) of the Rules applicable to Cases I. and II., Sch. D, Income Tax Act, 1918 (1), in the circumstances hereinafter appearing.

The appellant company carried on business as cotton manufacturers at Holden Vale, Haslingden, Lancashire. Between 30 per cent. and 40 per cent. of their cloth was sold to Haworth & Co., Ld., merchants of Manchester. The total issued capital of Haworth & Co., Ld., was 4204*l.*, in 1*l.* shares, of which the appellant company owned 4000*l.* The directorate of each company was the same. Haworth & Co., Ld., took cloth from manufacturers other than the appellant company.

The appellant company made up their accounts to June 30 and December 31 in each year. In the accounts to June 30, 1921, the appellant company wrote off 19,346*l*. 8*s*. 4*d*., this sum being part of a total debt of 29,019*l*. 12*s*. 6*d*. then owing by Haworth & Co., Ld., to the appellant company, which was estimated to be bad to that extent. The accounts of the appellant company and of Haworth & Co., Ld., were audited by the same firm of chartered accountants. In connection with the writing off of the said sum of 19,346*l*. 8*s*. 4*d*., the accountants wrote to the inspector of taxes on May 5, 1922, as follows :—

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(1) The Income Tax Act, 1918, Sch. D, Rules applicable to Cases I. and II., r. 3, provides: " In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of— (i.) any debts, except bad debts proved to be such to the satisfaction of the commissioners and doubtful debts to the extent that they are respectively estimated to be bad . . . ."

"This arises entirely in connection with the debt owing by Messrs. Haworth and Co., Limited. The debt amounted to 29,019*l*. 12*s*. 6*d*., and was not considered to be worth more than 6*s*. 8*d*. in the £. 13*s*. 4*d*. was therefore written off. We are inclined to agree that for excess profits duty purposes this item will have to be written back, although the matter is not entirely free from doubt. For income tax and corporation profits tax the item is clearly allowable. If you will refer to the balance sheet of Messrs. Haworth and Co., Limited, of April 30, 1921, you will find that the assets amount to 39,873*l*. 12*s*. 1*d*. and the liabilities to creditors to 84,762*l*. 8*s*. 9*d*., all the share capital having been lost. It was on these figures that Messrs. Anderton and Halstead, Limited, valued the debt at 6*s*. 8*d*. in the £. The trade since April, 1921, has been practically at a standstill, and the indebtedness to Messrs. Anderton and Halstead, Limited, has not been reduced. It is impossible to say what may happen to Messrs. Haworth and Co., Limited. It may be necessary to wind the company up, as you will see there are creditors' claims outside that of Messrs. Anderton and Halstead, Limited, of over 50,000*l*."

The inspector of taxes allowed the said sum of 19,346*l*. 8*s*. 4*d*., as a deduction in computing the profits of the year ending December 31, 1921, which were brought into the computation of the average of the company's profits for the years 1922–23, 1923–24, and 1924–25.

In the accounts to June 30, 1922, the appellant company wrote off a further sum of 9673*l*. 4*s*. 2*d*. as a bad debt, being the balance of the said debt of 29,019*l*. 12*s*. 6*d*. On August 13, 1923, the inspector of taxes sent the following inquiry to the accountants of the appellant company :—

"BAD DEBTS, HAWORTH AND CO., LIMITED, 9673*l.* 4*s.* 2*d.* I gather that this represents the balance of a sum of 29,019*l.* 12*s.* 6*d.*, of which 19,346*l.* 8*s.* 4*d.* was charged against profit for the half-year ended June 30, 1921. It seems clear that further indebtedness has been incurred by Haworth and Co., Limited, since the balance stood at 29,019*l.* 12*s.* 6*d.*, as I find that the further amount outstanding and due from the company was 1539*l.* 16*s.* 6*d.* at December, 1921, increased to 3371*l.* 7*s.* 9*d.* at June, 1922, and reduced again to 2058*l.* 19*s.* 3*d.* at December, 1922. If, as appears to be the case, business continues to be conducted with Messrs. Haworth and Co., Limited, in the ordinary way, I cannot understand how it becomes necessary to write off as a bad debt the sum of 29,019*l.* 12*s.* 6*d.* Further, I understand from other sources that very considerable sums due from Haworth and Co., Limited, in respect of differences are actually being paid. This again increases my difficulty in understanding the treatment of the debt of 29,000*l.* odd. Will you please let me hear from you fully on this matter ?"

To this inquiry the accountants replied on September 5, 1923 :—

"If you will refer to our letter to you of May 5, 1922, you will find that we there drew attention to the balance sheet of Messrs. Haworth and Co., Limited, and that, on the most favourable view, the creditors' debts were not worth more than 6*s.* 8*d.* in the £, 13*s.* 4*d.* was therefore properly written off leaving a balance of 9673*l.* 4*s.* 2*d.*, which has been written off in the accounts to June 30, 1922.

Having regard to the relationship between Messrs. Anderton and Halstead, Limited, and Messrs. Haworth and Co., Limited, the former owning practically the whole of the share capital of the latter company, the balance of this debt will perhaps require special consideration, and we are glad you have drawn attention to it.

We are disposed to think that if Messrs. Anderton and Halstead, Limited, stand by while the other creditors are receiving payments on account they would hardly be entitled to consider the balance of the debt as bad. Trade, however, is so bad that we think it quite likely that Messrs. Haworth and Co., Limited, may be wound up, in which case Messrs. Anderton and Halstead, Limited, would realize considerably less than the amount of their debt, 9673*l.* 4*s.* 2*d.*

How would it be if this balance were treated as a suspense item for the time being and the allowance to be made left over until the value of the debt could be more accurately ascertained ? "

To this letter the inspector of taxes replied on November 9, 1923, as follows :—

" I agree in the circumstances that for income tax purposes the only satisfactory method of treatment is to regard the balance of 9673*l.* as in suspense. I have accordingly written back this further sum in arriving at the Albert Mill adjusted profit for the half year to June, 1922. When the question of the treatment of this debt is finally settled, we can then allow in the appropriate accounting period any balance which Messrs. Anderton and Halstead, Limited, fail to recover in excess of 19,346*l.* 8*s.* 4*d.* which they have already been allowed in arriving at the adjusted Albert Mill profit for the half year ended June, 1921."

On July 7, 1924, the appellant company's accountants sent a letter to the inspector of taxes saying (inter alia) :—

" On reference to the correspondence relating to the 1922 accounts, you will find that it was agreed to reconsider at December, 1923, the treatment of the balance of Haworth and Co.'s debt, 9673*l.*,' written back in the 1923–24 income-tax computation. We are enclosing the last balance sheet of Haworth and Co. Limited, which discloses a very serious financial position. The debit balance on profit and loss account is 51,620*l.* as against 49,907*l.* in October, 1922, an increase of 1713*l.*

Our clients cannot afford to let Haworth and Co., Limited, go down, but it is quite certain that they will ultimately make a big loss, and until the exact position is known we would suggest that the balance of the debt of 9673*l.* should now be written off.

We may say our clients would be only too glad if they could get out with anything like so small a loss."

To this letter the inspector of taxes replied :—

"With reference to the debt of Haworth and Co., Limited, the balance sheet at October, 1923, does not suggest that the debt was of no value at that date. I am, however, prepared to agree that the present valuation of 6*s.* 8*d.* in the £ is excessive, and suggest that for the purposes of your clients' accounts to December 31, 1923, the debt be written down to 4*s.* in the £."

Accordingly in the computation of the company's profits for income tax purposes for the year ending December 31, 1923, a further sum of 3869*l.* was allowed, so that of the total debt of 29,019*l.* 12*s.* 6*d.* the amount actually allowed as representing the extent to which the said debt was estimated to be bad was 23,215*l.* 8*s.* 4*d.* made up of the said two sums of 19,346*l.* 8*s.* 4*d.* and 3869*l.* The profits of the company, as computed for income tax purposes for the year ending December 31, 1923, were brought into the computation of the average of the company's profits for the years 1924–25, 1925–26, and 1926–27.

Subsequently to June 30, 1922, the date when the balance of 29,019*l.* 12*s.* 6*d.* was written off in the company's accounts, the appellant company continued to sell cloth to Haworth & Co., Ld., as shown in the following statement :—

	Value of Cloth Sold.		
July 1, 1922, to December 31, 1923 .	£6,796	3	8
January 1, 1924, to December 31, 1924 .	£9,994	12	8
January 1, 1925, to December 31, 1925 .	£25,393	1	10
January 1, 1926, to December 31, 1926 .	£27,454	1	7
January 1, 1927, to December 31, 1927 .	£21,738	4	0

The balance sheets of Haworth & Co., Ld., showed the following liabilities to the appellant company and to other trade creditors :—

Date of Balance Sheet.	Sundry Trade Creditors.	Anderton & Halstead, Ld.	A. & H., Ld. Special Account.	A. & H., Ld. Loan & Interest.
	£	£	£	£
30.4.1920	2,544	15,252	—	—
30.4.1921	54,747	30,778	—	—
30.4.1922	37,888	5,902	30,019	—
30.4.1923	20,486	7,136	30,019	3,054
30.4.1924	6,652	10,130	30,019	8,295
30.4.1925	4,309	1,779	45,872	8,583
30.4.1926	1,711	1,377	44,308	8,417
30.4.1927	2,358	655	44,308	8,628

The facts stated in the two preceding paragraphs having come to the knowledge of the respondent, the additional assessments appealed against were made on March 27, 1929, under s. 125 of the Income Tax Act, 1918 (1), on the ground that the respondent had discovered that the company had been allowed from and in first assessments, for the years 1922–23 to 1926–27 inclusive, deductions not authorized by the said Act—namely, the deduction of the sums of 19,346*l.* 8*s.* 4*d.* and 3869*l.* as aforesaid.

Mr. Richard Halstead (a director of the appellant company) and Mr. W. Clifford Bolton (chartered accountant) appeared before the General Commissioners and stated that it would have been against the interests of the appellant company if Haworth & Co., Ld., were at any time forced into liquidation.

On behalf of the appellant company it was contended (inter alia):—

(1.) That the said debt was a trading debt incurred in the ordinary course of the appellant company's business.

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(1) By the Income Tax Act, 1918, s. 125, sub-s. 1: "If the surveyor discovers .... that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement, or relief not authorised by this Act, then and in every such case .... (ii.) where the tax is chargeable under Schedule D, the additional commissioners shall make an assessment, on the person chargeable, in an additional first assessment ...."

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(2.) That the said debt of 29,019*l.* 12*s.* 6*d.* had been estimated by the appellant company and the inspector of taxes to be bad at the relevant dates to the extent of 19,346*l.* 8*s.* 4*d.* and 23,215*l.* 8*s.* 4*d.* respectively; that the sums of 19,346*l.* 8*s.* 4*d.* and 3869*l.* respectively had accordingly been properly allowed for the relevant years in computing the profits of the appellant company, and that no grounds existed upon which the question could be reopened.

(3.) That there was no jurisdiction to make the additional assessments appealed against.

(4.) That the additional assessments should be discharged.

On behalf of the Crown it was contended (inter alia):—

(1.) That the company had been allowed deduction of 19,346*l.* 8*s.* 4*d.* and 3869*l.* in respect of bad debts in the computation of its profits for income tax purposes for the years ending December 31, 1921, and December 31, 1923, respectively.

(2.) That the profits of the company as computed for income tax purposes for the year ending December 31, 1921, were brought into the computation of the average of the company's profits for the years 1922–23, 1923–24 and 1924–25, and that the profits of the company as computed for income tax purposes for the year ending December 31, 1923, were brought into the computation of the average of the company's profits for the years 1924–25, 1925–26, and 1926–27.

(3.) That neither the said sum of 19,346*l.* 8*s.* 4*d.* nor the said sum of 3869*l.* nor any part of either of the said sums was a bad debt.

(4.) That the deduction of the said sums of 19,346*l.* 8*s.* 4*d.* and 3869*l.* in the computation of the profits of the company for the years ending December 31, 1921, and December 31, 1923, respectively or of any part of either of the said sums was not authorized by the Income Tax Acts.

(5.) That the respondent had discovered that the company had been allowed from and in first assessments, for the years 1922–23 to 1926–27 inclusive, deductions not authorized by the Income Tax Acts—namely, the deduction of the sums of 19,346*l.* 8*s.* 4*d.* and 3869*l.* as aforesaid.

(6.) That the additional assessments appealed against were correct and should be confirmed.

Having heard the evidence and considered the arguments of the parties, the General Commissioners were not satisfied that the said debt of 29,019*l.* 12*s.* 6*d.* or any part thereof had been proved to be a bad debt within the meaning of r. 3 (i.) of the Rules applicable to Cases I. and II., Sch. D, Income Tax Act, 1918, and they accordingly confirmed the assessments appealed against.

Messrs. Anderton & Halstead, Ld., appealed.

Latter K.C. and *Cyril King* for the appellants.

Sir William Jowitt A.-G. and *J. H. Stamp* for the Crown.

Cur. adv. vult.

June 16. ROWLATT J. read the following judgment: In this case the appellants were assessed under Sch. D for the years 1921–22 and 1922–23 upon the basis of a writing down in two years successively of a doubtful debt. This was done by agreement with the inspector of taxes, who had all the facts before him. The appellants have since, by additional first assessments, been charged anew by way of disallowance of that writing down, and on this appeal they challenge the validity of these additional assessments.

In order to clear the ground, I may point out at once that there is no question of the Crown having been bound by the first action of the inspector, by way of mere contract. No officer has power to do that. The question is: first, whether by virtue of the statutory provisions the original assessments closed the door to additional assessments altogether, and if not, then, secondly, whether the additional assessments though possible in a proper case can be supported in the actual circumstances of this case. The machinery under which assessments under Sch. D are made in the first instance is broadly as follows, though modern practice has, I believe, somewhat simplified the formalities. The taxpayer is required by s. 100 to deliver to the assessor a statement of his profits and gains, estimated according to the Act. By s. 121 these are to be laid before the Additional Commissioners, who, subject to provisions for (inter alia) objections by the surveyor, are to direct assessments to be made. By s. 122 these are to be signed by the Additional Commissioners and delivered to the General Commissioners, who by sub-s. 3 are to allow and confirm them after the time for hearing appeals has expired. The assessments then become binding: *Kensington Income Tax Commissioners* v. *Aramayo.* (1)

In the present case there was no appeal. If there had been, then by s. 133, sub-s. 2, after the determination thereof the assessments made thereon could not have been altered, and if on the appeal an objection by the surveyor to the assessment had been dealt with the surveyor would, by sub-s. 3, have been barred from making any further charge for the same year in respect of the same subject-matter.

Additional first assessments are provided for by s. 125, and may be made if the surveyor discovers, to put it shortly, an undercharge. Additional first assessments are subject by s. 136 to the same appeal in every way as a first assessment.

The first point made by Mr. Latter for the appellants was, as I understand it, that if there had been an appeal determined as regards the first assessment, an additional first assessment would have been barred by s. 133, sub-s. 2, and a first assessment unappealed should be equally conclusive. I cannot agree. Even if there had been an appeal, I do not think the sub-section would affect an additional first assessment. It only stereotypes the assessment under appeal. An additional assessment is a new process altogether. Mr. Latter's argument would destroy the power to make additional assessments altogether, for, as already pointed out, the circumstance that the surveyor assented to the first assessment with full knowledge of the facts does not, by introducing the element of agreement, add anything to its effect.

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(1) [1916] 1 A. C. 215; 6 Tax Cas. 613, 621.

The real question is whether, within the meaning of s. 125, the inspector has "discovered" an undercharge in the first assessment. The word "discover" does not, in my view, include a mere change of opinion on the same facts and figures upon the same question of accountancy, being a question of opinion. The meaning of the word was considered in *Rex* v. *Kensington Income Tax Commissioners* (1), where it was held that it did not mean "ascertained by legal evidence." But the mere fact of such a discussion of the means of ascertainment indicates an assumption that there was something to be ascertained somehow. How greatly it would have simplified the problem if it could have been said that the inspector makes a "discovery" if he merely changes his opinion, without any new information at all? Moreover, it is to be remembered that income tax is an annual tax for the service of the year, and when one finds a provision for an additional assessment within a period of six years one is led to expect machinery, not for a mere revision, but for the bringing in of something which had been overlooked.

Rex v. *Kensington Income Tax Commissioners* (1) was a case in which the "discovery" was challenged on prohibition, and the Attorney-General suggested that that was the procedure to raise the question now before me. It is quite clear, however, that the General Commissioners must consider and decide whether there has been a "discovery," and on that state a case if required on a point of law arising: compare *Rex* v. *Kingsland Inspector of Taxes.* (2)

The question for me is whether there was any evidence on which they could find in favour of the Crown on the whole matter. Now what has happened is this: the surveyor has made these additional assessments simply because it has come to his knowledge, as stated in the Case, that in the years since the two successive writings down of this debt were allowed the appellants have permitted the debtors to increase their indebtedness to them while the debtors reduced their indebtedness to other creditors. The finding of the General Commissioners on the appeal was that they were not satisfied that the debt or any part thereof had been proved to be a bad debt within the meaning of r. 3 (i.) of Cases I. and II.

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(1) [1913] 3 K. B. 870; 6 Tax Cas. 279.

(2) 8 Tax Cas. 327.

In my judgment, the General Commissioners have not considered the right question, and there was no evidence which would have supported the decision for the inspector if they had. Rule 3 (i.) is as follows: "In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of," and then after a list, "(i.) any debts, except bad debts proved to be such to the satisfaction of the commissioners and doubtful debts to the extent that they are respectively estimated to be bad. . . . ." What the statute requires, therefore, is an estimate to what extent a debt is bad, and this is for the purpose of a profit and loss account. Such an estimate is not a prophecy to be judged by after events, but a valuation of an asset de praesenti upon an uncertain future to be judged with regard to its soundness as an estimate upon the then facts and probabilities. It is not overthrown as an estimate in 1923 and 1924 by coming to the conclusion, as the General Commissioners have done, that in 1930 it had not been proved that the debts were to any extent bad. Supposing, however, instead of making an irrelevant pronouncement, the General Commissioners had addressed themselves to the true points—namely, the criticism of the estimate as in 1923 and 1924—what material had they before them to justify, first, the intervention at all of the inspector on the ground of a "discovery," and, secondly, their own action in upholding the additional assessment made in pursuance of that intervention? The only way, I think, in which it could be put would be that the subsequent growth of the indebtedness indicated that there must have been some fact in 1923 and 1924 which (*a*) was not taken into account in the estimate, and (*b*) would have made the estimate as an estimate in 1922 and 1923 higher. It may indicate that the appellants in 1923 and 1924 were willing to contemplate that the debt should or might increase, but I think it is merely guesswork in the circumstances of this case to infer that that was because there was then reason to think the existing debt good. Perhaps it may be said, loosely, that people who act as the appellants have done do not deserve to be allowed depreciation, and that is really the only basis on which it seems to me that the reconsideration of the estimate can be explained, but that is not a justification for these additional assessments.

My conclusion is therefore that at the best the case would have to go back to the General Commissioners for them to consider the proper question, but that inasmuch as in that case the only result would be a disallowance of the additional assessments, the appeal ought to be allowed simpliciter, the appellants having the costs.

Appeal allowed.

Solicitors for the appellants: *Gregory, Rowcliffe & Co.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

T. W. M.

THOMPSON (INSPECTOR OF TAXES) *v.* TRUST AND LOAN COMPANY OF CANADA.

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June 12, 16.

Revenue—Income Tax—Financial Trust Company—Temporary Investment—Treasury Bonds—Purchase cum coupon—Sale ex coupon—Receipt of Interest subject to Deduction of Income Tax—Whether Net Interest to be brought into Account under Sch. D—" Profits or gains arising or accruing . . . . from any trade"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

The respondents carried on business as a loan and finance company and in the course of such business they had dealings in stocks, shares, and other securities. They bought Treasury bonds cum coupon, and at the same time sold bonds of the same nominal value ex coupon. In the result, they received the interest on the bonds, less income tax, which was deducted under Sch. C:—

Held, that the net interest received by the respondents on the bonds, having been taxed under Sch. C, could not again be taken into computation for the purposes of assessment to income tax under Sch. D.

CASE stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax.

The respondents, the Trust and Loan Company of Canada, appealed against the following assessments to income tax —namely :—

(*a*) An assessment in the sum of 250,000*l.* for the year ending April 5, 1928.

(*b*) An assessment in the sum of 142,545*l.*, less 24*l.* wear and tear, for the year ending April 5, 1929.

(*c*) An additional assessment in the sum of 79,580*l.* for the year ending April 5, 1929.

The company, which had been incorporated in Canada in 1843, carried on business as a loan and finance company, and in the course of such business the company had dealings in stocks, shares, and other securities. The head office of the company was in London, and it was agreed that the company were assessable to income tax under Case I. of Sch. D in respect of the profits arising to the company from their business (1), including profits from the realization of or dealing in investments as hereinafter mentioned.

The issued capital of the company was 3,600,000*l.*, divided into 1,800,000 shares of 2*l.* each, and of this capital 1,350,000*l.*, being 15*s.* on each share, was paid up. On March 31, 1929, the company had outstanding debentures to the amount of 1,856,464*l.*

It was necessary for the company to have money in liquid form in order that they might be in a position to pay off debentures, which fell due from time to time.

The bulk of the company's money was in investments in Canada. On March 31, 1928, Canadian investments (mortgages and land) stood at 3,602,314*l.* On March 31, 1928, the company also held temporary investments amounting to 573,780*l.* The amount of money held by the company in temporary investments at any one time varied from about half a million to one million pounds. The company dealt with the temporary investments and from time to time changed the form of such temporary investments. It was admitted that any profits made by the company on the realization of temporary investments fell to be included as part of the profits assessable under Case I. of Sch. D.

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(1) Sch. D: "1. Tax under this Schedule shall be charged in respect of—

(*a*) The annual profits or gains arising or accruing—

. . . .

(ii.) to any person residing in the United Kingdom from any trade. . . . .

2. Tax under this Schedule shall be charged under the following cases respectively ; that is to say,—

Case I. Tax in respect of any trade not contained in any other schedule."

The sole question arising in this case related to certain $5\frac{1}{2}$ per cent. Treasury bonds (1930), forming part of the temporary investments of the company, which were purchased and sold by the company in the years material to this appeal in the following circumstances:—

The $5\frac{1}{2}$ per cent. Treasury bonds (1930), which were repayable on May 15, 1930, were dealt in on the Stock Exchange and quoted in the official lists. The market price was quoted in these lists at a certain figure from time to time, and a purchaser of the bonds required to pay as an addition to the purchase price a sum equal to the amount of the accrued interest on the bonds from the last interest date to the day fixed by the contract for settlement. The interest on these Treasury bonds was payable on May 15 and November 15 in each year.

During the years material to this appeal the company had entered into a number of transactions through members of the London Stock Exchange for the purchase cum coupon, and sale ex coupon, of $5\frac{1}{2}$ per cent. Treasury bonds (1930). On every day on which a contract to buy bonds cum coupon was made a contract was also made to sell bonds of the same nominal value ex coupon.

Each of the two corresponding buying and selling contracts fixed the same date for settlement of the bargains, the settlement date being fixed by the company as near as possible to the date on which the coupon to be detached from the bond bought by the company was due for encashment. The settlement day in all cases was on a date before the due date of the payment of the interest on the bonds, and where a purchase was effected through one broker the corresponding sale on the same day of a similar amount of bonds was effected through the same broker.

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Every purchase was completed by the broker delivering to the company at its office bonds with coupons attached. The coupons next due to be paid were detached by the company, and the sale ex coupon was completed by the company handing back the bonds to the broker with the coupons for subsequent interest still attached.

The company subsequently encashed the detached coupons and retained the money, being a half year's interest on the bonds less the amount of income tax deducted therefrom.

In the years ending March 31, 1927 and 1928, the following transactions of purchase and sale of 5½ per cent. Treasury Bonds were entered into by the company :—

1927.	Purchases.		Sales.
Nominal.	Cost.	Nominal.	Amount realized.
£293,000	£307,585 15 11	£293,000	£300,365 17 11
£2,500,000	£2,618,090 13 10	£2,500,000	£2,556,087 6 8
£250,000	£260,951 2 6	£250,000	£254,740 0 3

	Profit or loss on sale.	Interest before deducting tax.
Loss	£7,219 18 0	£8,057 10 0
Loss	£62,003 7 2	£68,750 0 0
Loss	£6,211 2 3	£6,875 0 0

In the year ending March 31, 1927, the company also purchased 350,000*l.* 5½ per cent. Treasury Bonds which were not sold but were retained by the company.

1928.	Purchases.		Sales.
Nominal.	Cost.	Nominal.	Amount realized.
£568,000	£587,232 6 1	£568,000	£573,148 7 6
£2,000,000	£2,078,043 1 8	£2,000,000	£2,028,064 15 10
£400,000	£417,128 19 6	£450,000	£458,563 12 11

	Profit or loss on sale.	Interest before deducting tax.
Loss	£14,083 18 7	£15,620 0 0
Loss	£49,978 5 10	£55,000 0 0
Loss	£10,471 11 7	£28,875 0 0

In every case upon encashment of the coupons income tax was deducted from the proceeds by the bank encashing the coupon in accordance with Sch. C of the Income Tax Act, 1918, r. 1 (*b*) and (*c*) of the Rules as to interest payable out of public revenue.

It was contended on behalf of the present appellant (H.M. Inspector of Taxes) (inter alia):—

(*a*) That the proceeds of the coupons detached by the company from Treasury bonds which had been bought and sold as before mentioned were not income of the company which had been taxed by way of deduction.

(*b*) That the net amount received on cashing the coupons (i.e., after deduction of income tax) was merely a receipt of the company's business which had to be added to the selling price of the bonds, in order to arrive at the profit or loss made on the purchase and sale of the bonds.

(*c*) That in computing the profits arising to the company from the transactions above described for the purposes of Case I., Sch. D, the amounts realized by the company on the sale of the bonds ex coupon plus the net amount of the interest received by the company in respect of the coupons detached as aforesaid after deduction of income tax should be treated as receipts and there should be deducted therefrom in order to arrive at the profit (if any) arising from the transaction the amount paid by the company for the bonds cum coupon.

It was contended on behalf of the company:—

(*a*) That the transactions were purchases and sales of Treasury bonds.

(*b*) That the company received interest in respect of the bonds purchased by them and that such interest was taxed in accordance with Sch. C.

(*c*) That the tax paid by way of deduction on encashment of the coupons was paid on behalf of the company, who were the persons entitled to the said interest, and that such interest was income in the hands of the company.

(*d*) That the interest, having already been taxed under Sch. C, could not again be taken into computation for the purposes of assessment under Case I. of Sch. D.

(*e*) That the net amounts received by the company in respect of interest on the said coupons should be ignored

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in computing the company's liability under Case I. of Sch. D.

The Special Commissioners found that the sums received by the company in respect of the coupons represented interest upon which tax had been paid by the company under Sch. C, and they allowed the appeal in principle. They therefore adjourned the case for the amounts of the assessments to be agreed between the parties.

The sole questions for the determination of the Court in the case were :—

(1.) Whether the coupons detached as aforesaid from the Treasury bonds or the proceeds thereof were to be regarded as income of the company taxed by way of deduction, or

(2.) Whether in computing the profits of the company under Case I. of Sch. D the net proceeds of the coupons (being the value thereof less the income tax deducted therefrom) should be added to the sale price of the bonds sold ex coupon in order to arrive at the profit or loss arising from the purchase of the bonds cum coupon.

Sir William Jowitt A.-G., *J. H. Stamp* and *Reginald P. Hills* for the Crown.

Latter K.C. and *Roland Burrows* for the respondents.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

June 16. ROWLATT J. read the following judgment: In this case the respondents are a trust company whose purchases and sales of investments are brought into account for the computation of their income to be assessed to income tax under Sch. D, but the interest on Government securities held by them is received subject to deduction of tax under Sch. C. It is therefore not brought into that account.

The question in this appeal has arisen upon the following transaction. The company bought some Treasury bonds, at the time when an instalment of interest was due, "cum dividend," and at the same time sold them "ex dividend."

As purchasers they received delivery of the bonds with coupons attached. They detached and cashed the coupons, and as sellers delivered the bonds to the buyers. The cash they received for the coupons was, of course, the interest less tax under Sch. C.

In these circumstances they, in making up their accounts for Sch. D, treated the cost of the purchase as an expenditure and the price obtained on the sale as a receipt. They did not bring in the sum of interest less tax received upon the coupons, which of course (neglecting any charges for brokerage) was the same amount as the difference between their buying and selling prices. Their contention, which has succeeded before the Special Commissioners, is that that is a sum already taxed; in fact, the residue of an instalment of interest after deduction of tax. The result, no doubt, is that a sum which would have been an item in their income, taxable under Sch. D, has been replaced by a sum of the same amount which is, if I may use the expression, "ex tax."

Mr. Stamp contended that the transaction was simply buying the sum which could be and was collected upon the coupons, and therefore that that sum, although in fact the balance, after deduction of tax, of an interest payment, must be brought into the Sch. D account against the outgoing by which it was purchased.

Mr. Latter, on the other hand, maintained that what was bought was the bonds, and that they had been possessed, though not for long, yet long enough to bear interest, that the interest had been subjected to tax by deduction under Sch. C, and that the residue could not be taxed again under Sch. D.

It is obvious that if the purchase and sale of these bonds had been separated by a considerable interval of time, the accounts would properly have been made out as regards the coupons cashed during the interval in the form that the respondents have adopted here. Why is a different result to follow because the interval has been one of only a few hours or even minutes? Mr. Stamp gave, as I understood him, two reasons. The first was that the intention was not to invest in these bonds but merely to acquire the coupon less tax. But if a person holds an investment at the moment when interest is paid upon it, and collects that interest and suffers deduction of tax from it under Sch. C as interest on that investment, I confess I cannot understand how the intention with which he put himself in that position can make him liable to a further tax, or indeed affect his taxation in any way whatever.

The second point made by Mr. Stamp was that this was not the respondents' interest at all, because they had not had their money invested in these bonds during the period over which it accrued, and that it was not the respondents who had borne the tax but the previous holders, who had received only the amount of interest less tax for their coupon.

I think these considerations are irrelevant for income tax purposes. This is illustrated by a reference to the super tax position in such cases. The person who cashes the coupon is the person who has the income. The interest becomes taxable at the moment of its payment.

The position revealed in this case is no doubt a very curious one, and seemed to me at first to present some difficulty. But upon reflection I think it all comes to nothing. The contention of the Crown is simply that the same sum can be taxed twice; first under Sch. C, and then again under Sch. D. The fallacy at the root of the argument is in supposing that the subject of the purchase was the balance of the coupon after deduction of tax and not the coupon itself cum tax, whether with or without the principal bond. The latter is the literal truth. If one can imagine the income tax to have changed between the brokers' contract and the settlement, the respondents would have been the persons affected. It may, indeed, be true to say that financially the transaction was the equivalent of buying a money order, to use Mr. Stamp's phrase, for the amount of the interest after deduction of tax. But equivalence will not do. The Crown cannot treat a transaction which has its own character for income tax purposes as if it were something of a different character.

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because in money result the two would come to the same thing.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitor for the Crown : *The Solicitor of Inland Revenue.*

Solicitors for the respondents : *Holmes, Son & Pott.*

T. W. M.

DEPENDABLE UPHOLSTERY, LIMITED *v.* BRASTED (McKENZIE, THIRD PARTY).

K. B. D.
1931
March 27 ;
April 20.
C. A.
June 11.

Landlord and Tenant—Agreement—Rates payable by Landlord—Industrial Hereditament—Derating—Deduction from Rent—Indemnity from Head Landlord—Rates, Taxes and Outgoings—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3—*Local Government Act,* 1929 (19 *Geo.* 5, *c.* 17), *s.* 68, *sub-s.* 1 ; *s.* 73, *sub-s.* 1.

By s. 73, sub-s. 1, of the Local Government Act, 1929 : "Where any rates in respect of an industrial hereditament occupied by a tenant are, whether by agreement or otherwise, payable by the landlord, then, so long as under any contract made before the commencement of this Act there is payable by the tenant in respect of the hereditament rent inclusive of those rates, the landlord shall, as from the appointed day, be liable to pay to the tenant or allow by way of deduction from his rent a sum equal to the difference between every amount payable by the landlord by way of those rates . . . . and the amount which would have been so payable at the rate in the pound current for the time being if the rateable value of the hereditament had been equivalent to the net annual value thereof" :—

Held, (1.) by Viscount Finlay J., that the meaning of the word "landlord" in the above section is not confined to a head landlord, but extends to a lessee who has sub-let the hereditament, so that the lessee is liable to his sub-lessee, the occupying tenant, for the amount of the difference in rates ;

(2.) by the Court of Appeal, reversing the judgment of Viscount Finlay J. on this point, that where a lessor covenanted to indemnify his lessee against "all rates, taxes and outgoings whatsoever," and the lessee was compelled to pay his sub-lessee the amount referred to in the above section, the payment was not an "outgoing" for which the lessor was liable to indemnify his lessee under the covenant.

ACTION tried by Viscount Finlay J. without a jury.

By a lease dated December 31, 1927, James McKenzie demised to the defendants certain premises in Upper Clapton Road, in the county of London, for the term of seven and a quarter years from March 25, 1927, at a yearly rent of 285*l*. and a further rent of 291*l*. by way of rates. This lease contained a covenant by James McKenzie, the lessor (inter alia) "to keep the lessees indemnified . . . . against all rates and taxes and outgoings whatsoever which now or hereafter may become payable in respect of the demised premises."

The defendants paid the rent under the above lease, and James McKenzie and his successors in title duly discharged the amounts payable by way of rates in respect of the premises. By an underlease dated January 2, 1928, the defendants sub-let the said premises to S. & J. Breckman, Ld., for the term of seven and a-quarter years from March 25, 1927, less the last three days thereof, at an inclusive yearly rent of 850*l*. This underlease contained in clause 17 a covenant of indemnity by the defendants in the same terms as those in the lease of December 31, 1927. On April 1, 1929, S. & J. Breckman, Ld., assigned this underlease to the plaintiffs.

The premises were occupied and used by the plaintiffs at all material times for an industrial purpose—namely, the making of furniture. Under the Rating and Valuation (Apportionment) Act, 1928, s. 3, and the Local Government Act, 1929, s. 68, the premises were entered in the special list for the borough of Hackney as wholly industrial at the net annual value of 465*l*. and the rateable value of 116*l*. The rates payable for the period from October, 1929, to April, 1930, were in consequence reduced from 131*l*. 15*s*. to 32*l*. 17*s*. 4*d*., being the amount assessable upon a rateable value of one-fourth only. The plaintiffs claimed: (1.) a declaration that they were entitled to the amount of the difference in rates as provided in the Local Government Act, 1929, s. 73, sub-s. 1, and (2.) the sum of 98*l*. 17*s*. 8*d*., the difference between the two amounts for the period from October, 1929, to April, 1930.

The defendants denied liability, and claimed, in the alternative, to be indemnified by the third party, who was the widow and executrix of the said James McKenzie, the original lessor, now deceased.

Graham Mould for the plaintiffs.

Hildesley K.C. and *Lawson Campbell* for the defendants.

Scholefield K.C. and *H. H. C. Graham* for the third party.

The arguments appear sufficiently from the judgment of Viscount Finlay J.

Cur. adv. vult.

April 20. VISCOUNT FINLAY J. delivered the following judgment:—

This case raises points of some difficulty in connection with the recent Acts with regard to derating. The action is brought by the plaintiffs, claiming to deduct the sum of 98*l.* 17*s.* 8*d.* from rent which they owe to the defendants, their immediate landlords. By an underlease dated January 2, 1928, the defendants let certain premises in the Upper Clapton Road, in the county of London, to a company called S. & J. Breckman, Ld., for seven and a quarter years, less three days from March 25, 1927, at an inclusive rent. On April 1, 1929, Messrs. S. & J. Breckman, Ld., assigned this underlease to the plaintiffs. The plaintiffs thus became entitled to the benefit of clause 17 of the underlease, whereby the lessors covenanted to "pay the rent reserved by and observe the covenants contained in the lease under which they hold the demised premises and keep the lessees indemnified against the same and against all rates, taxes and outgoings whatsoever which now or hereafter may become payable in respect of the demised premises." These premises were used for an industrial purpose—namely, for the making of furniture. By the Rating and Valuation (Apportionment) Act, 1928, s. 3, and the Local Government Act, 1929, s. 68, the premises were entitled to the benefit of the derating provisions, with the result that whereas the rates which would otherwise have been payable for the period in question were 131*l.* 15*s.*, the rates in fact payable amounted to the sum of 32*l.* 17*s.* 4*d.* The plaintiffs claim to recover from the defendants the sum of 98*l.* 17*s.* 8*d.*, being the difference between the two amounts.

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The defendants deny liability, and have brought in as third party their head landlord. It was admitted that by the general scheme of this legislation the occupier of the premises who there carried on a business of an industrial character was to have the benefit of the derating provisions. The machinery for carrying this into effect is to be found in the Local Government Act, 1929, s. 73, sub-s. 1, and it was upon that section that the able arguments addressed to me by counsel for the respective parties mainly turned. That section is as follows: "Where any rates in respect of an industrial hereditament occupied by a tenant are, whether by agreement or otherwise, payable by the landlord, then, so long as under any contract made before the commencement of this Act there is payable by the tenant in respect of the hereditament rent inclusive of those rates, the landlord shall, as from the appointed day, be liable to pay to the tenant or allow by way of deduction from his rent a sum equal to the difference between every amount payable by the landlord by way of those rates, after deducting any allowance, commission, abatement, or deduction granted to him by the rating authority, and the amount which would have been so payable at the rate in the pound current for the time being if the rateable value of the hereditament had been equivalent to the net annual value thereof."

It was argued that in that section "the landlord" meant the head landlord only. I am unable so to construe the section. It appears to me that when the deeds as between the plaintiffs and the defendants are looked at, the defendants were the landlords of the plaintiffs, and it further appears to me that all the other conditions of the section are precisely fulfilled. There was no privity between the plaintiffs and the third party as landlord of the defendants, and I am unable to see anything in the section which would justify me in saying that it does not apply as between the plaintiffs and the defendants. It seems to me that both on the general scheme of the legislation and—more important still—on the precise words of the section, the plaintiffs are entitled to succeed against the defendants.

Greater difficulty has been caused to me by the second part of the case. The defendants claim to be indemnified by the third party, who is the widow and the executrix of Mr. James McKenzie. By a lease of December 31, 1927, these premises were let by Mr. James McKenzie to the defendants. The rent was a yearly rent of 285*l*., and a further rent of 291*l*. by way of rates. There was also contained in the lease the following indemnity with respect to the rates and other outgoings: "And also that he, the lessor, will . . . . keep the lessees indemnified against all rates and taxes and outgoings whatsoever which now are or hereafter may become payable in respect of the demised premises." The point is whether under that clause the defendants are entitled to be indemnified by the third party against this payment. The legislation in question has been introduced and passed since the date of the lease, and therefore the indemnity clause could not have been framed with any reference to it. If the indemnity had been in respect of rates only, I should have felt great difficulty, because it can scarcely be said that a sum which represents the difference between the amount due for rates and the amount which would have been so payable but for the Act of 1928, is to be regarded as rates. The Local Government Act, 1929, s. 73, cannot apply because, although as between the defendants and the third party there was the relationship of landlord and tenant, the defendants are not in occupation. The real question therefore is whether the indemnity clause in the lease applies. What is the meaning of the word "outgoings"? One does not expect to find any authority close to the present, because this is very recent legislation, but the existing authorities do show that the word "outgoings" is a word of wide ambit and is to be widely construed. Here the defendants are, in my judgment, compelled to pay this sum to the plaintiffs in respect of their interest in these premises, and are compelled to pay it by virtue of an Act of Parliament. It must therefore in my opinion be regarded as an outgoing. This point is a difficult one, but for the above reasons I hold that the defendants are entitled to be indemnified by the third party,

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who is indeed the proper person to bear this charge. I therefore give judgment for the plaintiffs against the defendants, and hold, that as between the defendants and the third party, the defendants have made out their claim to be indemnified.

Solicitors for plaintiffs: *Hyman Isaacs, Lewis & Mills.*

Solicitors for defendants: *Harris, Chetham & Cohen.*

Solicitors for third party: *Cooper, Bake, Fettes, Roche & Wade.*

F. P. F.

The third party appealed. The appeal was heard on June 11, 1931.

Scholefield K.C. and *H. H. C. Graham* for the appellant. The learned judge was wrong in holding that this sum of 98*l.* 17*s.* 8*d.*, which Messrs. Brasted, the mesne lessors, have been obliged to pay to their tenants by virtue of s. 73 of the Local Government Act, 1929, is an "outgoing" within the meaning of the lease of December 31, 1927, against which the appellant has covenanted to indemnify Messrs Brasted. It is not an outgoing "in respect of the premises." If it could properly be called an outgoing at all, it is in respect of the use to which Messrs. Brasted's lessees have put the premises and not in respect of the premises themselves. If the same premises were occupied and used as a retail shop and not as an industrial hereditament, they would not be derated, and Messrs. Brasted would not be liable to make any payment or allowance to their lessees: *Tidswell* v. *Whitworth* (1); *Foulger* v. *Arding*. (2)

But further, the sum in question is not an outgoing in the proper sense of the word. It is merely a sum which Messrs. Brasted are obliged to repay because they had no right to receive it. If their lessees, instead of paying it and recovering it, had not paid it at all, but had deducted it from their rent, the sum deducted could not properly have been called an outgoing; it would merely be a sum which Messrs. Brasted had not received because they were not entitled to it.

(1) (1867) L. R. 2 C. P. 326.

(2) [1902] 1 K. B. 700.

Laski K.C. and *Lawson Campbell* for the respondents cited *Thompson* v. *Lapworth* (1) and *Lowther* v. *Clifford.* (2)

Scholefield K.C. in reply.

SCRUTTON L.J. We have had a number of cases under this Act upon the question what premises are and what are not to be derated. The next question is, when premises are to be derated, who is to get the benefit of the 75 per cent. deduction from the full rate, the landlord or the tenant ? and what is to happen when there is a series of landlords and tenants, a head landlord letting to a tenant, who sub-lets to a tenant, who in his turn sub-lets to another ? Who are to be benefited by the derating ?

In this case a firm called Dependable Upholstery, Ld., were in occupation of a hereditament and carrying on there a business which entitled them to have the hereditament entered in the special list prepared under s. 5 of the First Schedule to the Rating and Valuation (Apportionment) Act, 1928, so that 25 per cent., and no more, of the rates on the hereditament were paid. These Occupiers paid to their landlords, Messrs. Brasted, the defendants, a rent of 850*l.*, which was paid upon the footing that Messrs. Brasted would ultimately bear the rates. Now Parliament, foreseeing what might happen, enacted in s. 73, sub-s. 1, of the Local Government Act, 1929, that " where any rates in respect of an industrial hereditament occupied by a tenant are, whether by agreement or otherwise, payable by the landlord,"—I think rates are payable, within the meaning of this section, by a landlord who has agreed to indemnify his tenant against them—" then, so long as under any contract made before the commencement of this Act "—this is such a contract—" there is payable by the tenant in respect of the hereditament rent inclusive of those rates, the landlord shall, as from the appointed day, be liable to pay to the tenant or allow by way of deduction from his rent a sum equal to the difference between every amount payable by the landlord by way of those rates . . . . and the amount which would have been so payable at the rate in the pound current

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(1) (1868) L. R. 3 C. P. 149, 159.

(2) [1927] 1 K. B. 130, 136.

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for the time being if the rateable value of the hereditament had been equivalent to the net annual value thereof." In other words, a sum equal to the difference between 100 per cent. and 25 per cent. The meaning of that section is clear: the Legislature intended that the benefit of this 75 per cent. reduction should go to the occupying tenant; if he had to pay his landlord a rent calculated on the basis that the landlord paid the full unreduced rate, the benefit would accrue to the landlord and not to the tenant. Accordingly, acting under s. 73, Dependable Upholstery, Ld., the tenants, who paid 25 per cent. of the rates, but who by the terms of their lease had paid their landlords, Messrs. Brasted, rent calculated on the assumption that Messrs. Brasted would have to pay the full unreduced amount of the rate, claimed from Messrs. Brasted 75 per cent. of the rate. The case was heard in the Court below, and the learned judge decided that Messrs. Brasted were liable to pay to Dependable Upholstery, Ld., the amount they claimed. From that decision there is no appeal.

The appeal arises in this way. Messrs. Brasted were themselves lessees of one James McKenzie. They had covenanted to pay McKenzie a yearly rent of 285*l.* and a further rent of 291*l.* by way of rates. They were to pay the rent without any deduction. Their lease contained also the following covenant by McKenzie, on which this case turns: "Also that he the lessor will pay the rent reserved by and observe the covenants contained in the lease under which he holds the demised premises and keep the lessees indemnified against the same and against all rates, taxes and outgoings whatsoever which now are or hereafter may become payable in respect of the demised premises." Messrs. Brasted, who have been held liable to pay 98*l.* to their tenants, Dependable Upholstery, Ld., because of the provisions of s. 73 of the Local Government Act, 1929, claim that this 98*l.* is an outgoing against which they are entitled to be indemnified as being an outgoing which has become payable in respect of the demised premises. The learned judge has held that this contention is right, and has given judgment for Messrs. Brasted.

The third party, who is the executrix of James McKenzie, appeals against that decision.

Sect. 73 of the Local Government Act, 1929, has but little application to this case. That section applies directly where rates in respect of an industrial hereditament occupied by a tenant are payable by the landlord. The respondents are not in occupation of these premises. They have let them to lessees. Sect. 73 may therefore be omitted from the discussion except as explaining the nature of the 98*l.* claimed by the respondents. The real question turns on the construction of the covenant of indemnity in the lease of December 31, 1927. Is that sum an outgoing in respect of the demised premises? It is a sum which the respondents have been obliged to pay their lessees because the lessees have been relieved of certain rates in respect of the demised premises, while the rent paid by the lessees was fixed on the assumption that the full rates would be payable. Is that an outgoing? The question may be put thus: It is supposed that 100*l.* will have to be paid for rates on the premises. The landlord says to the tenant: "I will relieve you of that burden if you will pay an additional 100*l.* rent." Then, for the benefit of the tenant, a statute is passed by which instead of 100*l.* the rates become 25*l.*, and the Legislature secures the tenant by saying to him: "You computed your rent at 200*l.* on the assumption that your landlord was going to relieve you of an obligation to pay 100*l.* rates; now that you are only obliged to pay 25*l.* for rates your rent must be reduced by 75*l.*" In that state of things the repayment of 75*l.* by the landlord to the tenant is not an outgoing; it is a balancing transaction. I do not think the word "outgoing" is an apt word to express a payment made in these circumstances.

Secondly, the covenant relied on by the respondents is a covenant by the appellant against "outgoings . . . . which . . . . may become payable in respect of the demised premises." In my opinion this 98*l.* is not a payment in respect of the premises, but in respect of the demise of those premises which the respondents have made to Dependable Upholstery, Ld.

For these reasons I think the appellant, the third party, is right in his contention that he is not liable to pay to the respondents the sum which they became liable to pay to Dependable Upholstery, Ld. The appeal must be allowed and the appellant must have judgment against the respondents.

GREER L.J. I am of the same opinion. The learned judge has ordered the appellant to pay to the respondents by way of indemnity a sum of 98*l.* 17*s.* 6*d.*, and has made in favour of the respondents a declaration that the appellant is liable to indemnify them on the ground that they are entitled to that relief under a covenant contained in a lease dated December 31, 1927, of certain premises described as "all that large room offices and workshop on and consisting of the first floor of the building," as delineated in the plan annexed to the lease. The rent was to be 285*l.* payable by equal quarterly payments on the usual quarter days, and also the further rent by way of rates of 291*l.* 15*s.* 11*d.* That division of the rent does not, in my opinion, make any difference to the question we have to determine. It is as if the rent had been stated in one sum with an undertaking by the lessor to indemnify the lessees. The lessees covenant to pay "the clear yearly rent of 285*l.* by equal quarterly payments on the usual quarter days without any deduction or abatement thereof except landlord's property tax." Later in the lease is the covenant which has to be interpreted and applied to the facts of this appeal. It is in these terms: "And also that the said lessor will pay the said rent and observe the covenants contained in the lease under which he holds the demised premises and keep the lessees indemnified against the same and against all rates taxes and outgoings whatsoever which now are or hereafter may become payable in respect of the demised premises." Two days after that date there was a sub-lease by the defendants to the assignors of the plaintiffs at a rent of 850*l.* per annum with a similar covenant by the defendants to indemnify the plaintiffs' assignors against the payment of rates. In this state of things the Local Government Act, 1929, was passed, which granted relief in respect

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of rates to the occupiers of industrial hereditaments. The premises in question admittedly constitute an industrial hereditament, and it is common ground that the defendants' tenants, the plaintiffs in the action, were entitled to relief in respect of three-fourths of the rates on the hereditament. But it occurred to those who drew the Act that the intention of the Legislature to benefit the person carrying on the business in the industrial hereditament might by the terms of his lease be diverted to his landlord. Sect. 73 was passed to prevent this and to confine the benefit to the actual occupier of the industrial hereditament carrying on the kind of business which Parliament desired to assist. The section provides as follows: [The Lord Justice read s. 73 and proceeded:] I regard that section as showing an intention to leave the lessor of an industrial hereditament in exactly the same position as he was in before the Act was passed; instead of paying to the rating authority the full amount of the rates, which under his covenant of indemnity with his lessee he is liable to pay, he now pays part to the rating authority and pays or allows the balance to his lessee. The effect of that is that, notwithstanding the terms of the lease between the occupier of the industrial hereditament and his immediate landlord, the benefit of the derating goes to the occupier and is prevented from going to the landlord. I cannot assent to Mr. Laski's contention that the position of the immediate landlord of an industrial hereditament is by s. 73 made any worse than it was before the Act. It seems to me a misuse of words to describe as an outgoing this allowance which the landlord has to make to his tenant so that the tenant and not he, the landlord, may have the benefit of derating. This is not an outgoing which the landlord is incurring under his lease from his own lessor. It is not an outgoing at all. An outgoing means some expense which the tenant is put to, it may be by some Act of Parliament made after the date of the lease, but it must be some expense. The mere fact that, in order to prevent him from obtaining a benefit which was never intended for him, an Act provides that what he receives with one hand he shall give away with the other, does not

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submit him to an outgoing within the meaning of the clause in his lease. It may be that by a windfall the head lessor is, as the result of legislation, in a better position than formerly, but that does not avail his lessee unless his lessee is able to show that the statute has imposed upon him an expense which he had not to bear before the Act. For these reasons I agree that the appeal should be allowed.

Slesser L.J. I agree that the third party should succeed in this appeal. First, it is clear that when the lease of December 31, 1927, imposed upon the third party the obligation to indemnify the respondents against "outgoings payable in respect of the demised premises," the word "outgoings" referred to some expense to which the lessees, the respondents, should be put to in respect of the demised premises. Bramwell B. in *Crosse* v. *Raw* (1) describes an outgoing as something which has gone out, an expense which the tenant has been at in respect of the premises—an expense imposed on him. In my opinion no expense was so imposed upon the respondents by reason of s. 73 of the Local Government Act, 1929, in respect of the relief from rates which had been given to their sub-tenants.

Secondly, I cannot agree with the contention that the so-called outgoing was payable "in respect of the demised premises." In my view the payment was made in respect of the occupation and user of the premises. By s. 68, sub-s. 1, of the Local Government Act, 1929, relief is given in respect of an industrial hereditament occupied and used wholly for industrial purposes. It is true that the lease and sub-lease in this case speak of a workshop, but it does not follow from the mere fact that premises are a workshop that therefore they are a fit subject for relief under the Act of 1929 or that of 1925. Relief is granted because the premises are occupied in a manner contemplated by those Acts; and not only because they are so occupied; they must be also so used. Therefore it is not in respect of the demised premises as such that relief is given. The same premises, if they were otherwise occupied or used, would not entitle the Occupier to relief.

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(1) (1874) L. R. 9 Ex. 209, 212.

Appeal allowed.

Solicitors for appellant: *Cooper, Bake, Fettes, Roche & Wade.*
Solicitors for respondents: *Harris, Chetham & Cohen.*

W. H. G.

LONDON COUNTY COUNCIL *v.* STILGOE AND ANOTHER.

1931
May 1, 4, 12.

London (Building)—Dangerous Structure—Magistrate's Order—Notice—Non-compliance—Work executed by County Council—Recovery of Expenses—Owner or Occupier—"Owner" of the Structure—London Building Act, 1894 (57 *&* 58 *Vict. c. ccxiii.*), *ss.* 5, 109, 112, 173, *sub-s.* 1.

By s. 109, sub-s. 1, of the London Building Act, 1894: "All expenses incurred by the Council in relation to the obtaining of any order as to a dangerous structure and carrying the same into effect . . . . shall be paid by the owner of the structure but without prejudice to his right to recover the same from any person liable to the expenses of repairs."

By s. 5: "The expression 'owner' shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement or in the occupation of any land or tenement otherwise than as a tenant from year to year or for any less term or as a tenant at will."

By s. 173: "Where it is by any provision of this Act declared that expenses are to be borne by or may be recovered from the owner of any premises (including under the term 'owner' the adjoining and building owners respectively) the following rules shall be observed with respect to the payment of those expenses:

(1.) The owner immediately entitled in possession to the premises or the occupier thereof shall in the first instance pay the expenses with this limitation that an occupier shall not be liable to pay any sum exceeding in amount the rent due or that will thereafter accrue due from him in respect of the premises during the period of his occupancy. . . . ."

Where there has been failure to comply with a magistrate's order under the London Building Act, 1894, to remove or repair a dangerous structure, and where the London County Council have themselves demolished the dangerous structure, the Council, in taking proceedings to recover the expenses, must proceed in the first instance, not against the owner in fee simple, but against the owner immediately entitled in possession, or the occupier of the premises, in accordance with s. 173, sub-s. 1, of the London Building Act, 1894.

Mourilyan v. *Labalmondiere* (1861) 1 E. & E. 533; 30 L. J. (M. C.) 95, followed.

CASE stated by a Metropolitan Stipendiary Magistrate.

A complaint was made by the appellants, the London County Council, that they (the appellants), acting under the provisions of the London Building Act, 1894, and the London Building Act, 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii.), had incurred expenses amounting to 78*l.* 19*s.* 7*d.* in respect of the demolition of a structure, being a bridge over Sutton Street, connecting the Astoria Theatre with Metro House, 155 Charing Cross Road, Westminster, which bridge had been duly certified to them, according to the provisions of the above named Acts, to be in a dangerous state and that the respondents, W. H. Stilgoe, of 22 Conduit Street, W., and Eldred Funnell, of 43 Bedford Row, W.C., the owners of the structure, had on demand neglected to pay those expenses to the appellants.

On the hearing of the complaint the following facts were proved or admitted: The respondents were the owners in fee simple of premises known as Metro House, 155 Charing Cross Road. Under a sub-lease the Metropolitan Vickers Electrical Company, Ld., were at all material times in actual occupation of Metro House. Messrs. Rossdale & Rossdale were the owners in fee simple of the Astoria Theatre, Charing Cross Road. Under a sub-lease the Berkeley Syndicate, Ld., were at all material times in actual occupation of the Astoria Theatre.

Until the events hereinafter described, the Astoria Theatre and Metro House were connected by an overhead bridge passing over a public highway known as Sutton Street. On December 6, 1928, a district surveyor under the London Building Act, 1894, certified to the appellants that that bridge was in a dangerous state. In consequence of that certificate, the appellants, on December 7, 1928, served a notice on the owner and occupier of the bridge, in the manner required by s. 5 of the London Building Act, 1894 (Amendment) Act, 1898, requiring them forthwith to take down or otherwise secure the bridge. That notice was not complied with, and on April 5, 1929, the appellants made a complaint to a metropolitan magistrate, who, after hearing the

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complaint, adjudged that it was true and ordered that the owner of the bridge should be required to take down, repair, or otherwise secure it, to the satisfaction of the surveyor.

That order was not complied with, and the appellants, acting under the powers conferred by the London Building Act, 1894, themselves took down the bridge. The expenses incurred by the appellants in obtaining the order and in taking down the bridge amounted to 157*l.* 19*s.* 1*d.* Those expenses were demanded by notice in writing dated July 12, 1930, by the appellants in equal moieties from the respondents and from Messrs. Rossdale & Rossdale. Neither the respondents nor Messrs. Rossdale & Rossdale had paid the sums demanded or any part thereof.

The appellants had made a complaint against Messrs. Rossdale & Rossdale in respect of the sum of 78*l.* 19*s.* 7*d.*, being their moiety of the expenses incurred by the appellants in obtaining the order with regard to the dangerous structure and in taking down the bridge. But they had not taken proceedings for the recovery of the expenses or any part thereof from the Metropolitan Vickers Electrical Company, Ld., or from the Berkeley Syndicate, Ld.

It was contended on behalf of the appellants that the respondents were the owners of a moiety of the bridge and were liable to pay the expenses in question under and by virtue of ss. 109 and 112 of the London Building Act, 1894. It was contended on behalf of the respondents that even if the respondents were the owners of a moiety of the bridge, within the meaning of ss. 5, 109 and 112 of the London Building Act, 1894, yet by reason of s. 173, sub-s. 1, of that Act, the respondents were not liable to pay the expenses in question, in the first instance.

The magistrate dismissed the complaint, and also the complaint against Messrs. Rossdale & Rossdale, on the ground that by reason of s. 173, sub-s. 1, of the London Building Act, 1894, the owner immediately entitled in possession of the premises or the occupier thereof ought in the first instance to have been summoned.

The complainants, the London County Council, appealed.

A. M. Trustram Eve for the London County Council, complainants, appellants. The summonses were rightly taken out against the defendants as parties liable for the expenses incurred by the complainants in the demolition of the bridge in question. The London Building Act, 1894, s. 109, sub-s. 1, provides that all expenses incurred by the Council in respect of a dangerous structure shall be paid by the owner of the structure. Sect. 5, sub-s. 29, defines the term owner as applying to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement or in the occupation of any land or tenement otherwise than as a tenant from year to year or for any less term or as a tenant at will. The term owner as there defined means primarily the owner in fee, though it may also include an intermediate lessee and a lessee in possession: see *London County Council* v. *Brook Cottages* (*Owners of*) (1).

Sect. 109 is one of the sections included in Part IX. of the Act relating to dangerous and neglected structures. For the purposes of that section "owner" means the owner in fee. That appears from sub-s. 1 of that section which speaks of the owner of the structure, and also from sub-s. 2, which refers to the owner as the person entitled to receive the surplus proceeds of the sale of the structure. In several other sections in that Part of the Act in which the term "owner" is used it can only mean the owner in fee. Thus, under s. 110, the powers acquired by the purchaser of the structure show that he as successor of the vendor is an owner in fee. In s. 112 the term owner is so used as to show that it means the person in whom the materials of the structure and the proceeds of their sale are vested. Sect. 115, sub-s. 4, provides that expenses incurred by the Council in relation to a neglected structure may be recovered from the owner of the structure without prejudice to his right to recover them afterwards from the lessee, and it thus pre-supposes that the owner is a lessor and not a lessee, or in other words that he is the head lessor or owner in fee. Sect. 116 provides that a dangerous or neglected structure in respect of which expenses have been incurred shall not be let until payment of the expenses, thus showing that it is the person who is in a position to let the structure who is liable, that is prima facie the freeholder. These provisions all go to show that the term "owner" in s. 109 means primarily the owner in fee; but, even if it includes also the intermediate lessee and the lessee in possession, it still includes the owner in fee, and proceedings may properly be taken against him for expenses under that section. The magistrate was wrong in supposing that the effect of s. 173 was to render the occupier of the premises the only person against whom proceedings could be taken under the Act for the recovery of these expenses. That section enacts that where it is by any provision of the Act declared that expenses are to be borne by the owner of any premises, including adjoining and building owners, certain rules shall be observed, r. 1 being that the owner immediately entitled in possession or the occupier shall in the first instance pay the expenses, with the limitation that an occupier shall not be liable to pay more than the amount of the rent due from him. That section on its true construction does not interfere with the right of the Council under the earlier sections of the Act to proceed against the owner in fee or any other owner, or oblige it to proceed against the occupier only. The original remedy of the Council is against the owner in fee, and s. 173, while recognizing that remedy, gives the Council an alternative remedy by providing that the occupier shall in the first instance pay to the extent of the rent due from him, and, further, by r. 6, that the expenses may be recovered in a summary way. The effect of that section is that the person liable to pay the expenses in the first instance is the person who is first asked to pay them, and that if he fails to do so recourse may then be had against any other owner or occupier. If the Council finds that the owner in fee cannot pay it may under that section proceed in the first instance against the occupier; and, on the other hand, if the occupier has no means, proceedings against him under the section would be an empty formality and recourse may be had against the owner in fee or any other owner. The owner in fee is the person primarily liable for the expenses, but for recovering them there are two separate procedures which are not contradictory but supplementary of each other, and either of which may be adopted by the Council. Under ss. 109 and 112 the expenses shall be paid by the owner without prejudice to his right to recover them from any other person liable: under s. 173 they shall in the first instance be paid by the owner in possession or the occupier, and if any of the owners cannot be found the deficiency shall be divided among those who can be found. In this case the appellants properly adopted the former procedure. To say that s. 173 obliges the Council to proceed in the first instance against the occupier only, is to say that it is contradictory of all the earlier sections already referred to. In ss. 90 and 100 the expressions building owner and adjoining owner appear to mean, at least primarily, the building and adjoining owners in fee of the party structure. The case of *Mourilyan* v. *Labalmondiere* (1), in which it was held that the term "owner" included a lessee, is distinguishable from the present case, because there the proceedings were under a different Act from that here in question. In *Hunt* v. *Harris* (2) it was held that an intermediate lessee for ninety-nine years, though he had sub-let to occupiers for shorter terms, was an "owner." The case of *Debenham* v. *Metropolitan Board of Works* (3) shows that the policy of Acts like that in question is to leave the public authority free to take proceedings against any of the several owners. They should not summon the occupier when he cannot pay.

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(1) Unreported. Divisional Court, July 18, 1929.

H. H. Maddocks, for the defendants, respondents. The magistrate rightly dismissed the summons against the defendants on the ground that they as owners in fee of the premises were not liable as "owners" for the expenses in question. The term "owner" as defined in s. 5 of the London Building Act, 1894, is no doubt wide enough to include a freeholder or owner in fee. Though s. 109 provides that the expenses in relation to dangerous structures shall

(1) 1 E. & E. 533; 30 L. J. (M.C). 95.

(2) (1865) 34 L. J. (C. P.) 249.

(3) (1880) 6 Q. B. D. 112.

be paid by the owner, it does so without prejudice to his right to recover them from the lessee or sub-lessee. The term owner in s. 112 may mean either the owner in fee, the intermediate lessee or the tenant in occupation. It is because the definition of the term owner in s. 5, and its meaning in the earlier sections of the Act, is so wide, that s. 173 is introduced for the purpose of showing who is to be liable as owner in the first instance. Under sub-s. 1 of that section, if owner means freeholder, then the freeholder would be liable in the first instance for all the expenses, and he could not recover from the occupier in respect of them any sum in excess of the amount of the rent which happened to be due.

Although the definition of "owner" in s. 5 of the Act is wide enough to include the defendants, they are not the proper persons for the London County Council to proceed against. Sect. 173 of the Act of 1894 clearly requires that the owner immediately entitled in possession of the premises, or the occupier, shall, in the first instance, pay the expenses. It is not contended that the defendants could in no circumstances be held liable. But under s. 173, sub-s. 1, the person immediately entitled in possession—that is, the leaseholder or the sub-lessee as the case may be—shall be summoned, in the first instance, for these expenses. In *Mourilyan* v. *Labalmondiere* (1) the justices held that "owner" meant the freeholder, but the High Court reversed their decision and held that it included a lessee. The case of *Mourilyan* v. *Labalmondiere* (1) arose under the Metropolitan Building Act, 1855, in which s. 3 and s. 73 are substantially in the same terms as those of s. 5 and s. 109 of the London Building Act, 1894, under which the present case arises. Moreover, s. 173 of the Act of 1894 replaces s. 97 of the Act of 1855. The decision in *Mourilyan* v. *Labalmondiere* (1) is a binding authority on the question to be decided in the present case.

[*Caudwell* v. *Hanson* (2) was referred to.]

A. M. Trustram Eve replied.

Cur. adv. vult.

(1) 1 E. & E. 533; 30 L. J. (M. C.) 95. (2) (1871) L. R. 7 Q. B. 55.

1931. May 12. LORD HEWART C.J. read the following judgment (in which he stated that Humphreys J. concurred :) The question raised in this case is whether the London County Council, the appellants, are entitled to proceed against the respondents, the owners in fee simple of a dangerous structure, to recover expenses incurred by the Council in the demolition of that structure without first attempting to recover those expenses from the occupier or the owner immediately entitled in possession.

In the present case the occupiers were the Metropolitan Vickers Electrical Company, the holders of a twenty-one years' lease carved out of a term of ninety-nine years granted by the respondents to certain other persons. All three parties were therefore " owners " within the definition of that term in s. 5 of the London Building Act, 1894. The Council proceeded by way of summons in the police court issued under ss. 109 and 112 of that Act. It was not disputed before the learned magistrate, who considered the matter with great care, nor before us that upon the facts of the case those sections would suffice to render the respondents liable, but it was contended, and the contention found favour with the learned magistrate, that s. 173, sub-s. 1, operated to postpone the rights of the Council against the freeholder until proceedings had been taken against the Metropolitan Vickers Electrical Company, Ld., and/or the holders of the ninety-nine years' lease. The magistrate accordingly dismissed the summons and stated this Case.

If the effect of s. 173, sub-s. 1, in this case is that which is contended for it seems to follow that in every case where the occupier of a dangerous structure is, as may often happen, a weekly tenant, proceedings must in the first instance be taken against that person to recover the whole amount of the expenses, although the Council may know that he is entirely without means to pay, and in any event his liability is restricted to the amount of rent due. It is to be observed that ss. 102–117 constitute Part IX. of the Act and form a code of procedure with regard to dangerous and neglected structures. It seems reasonably clear that the scheme of this part of the Act points to an owner as distinct from an occupier as the person out of whose pocket the expenses are to come, and the argument for the respondents would seem to involve reading into s. 109 after the words "owner of the structure" the words "if he is immediately entitled to possession of the premises," or some such words as "in default of payment by the occupier." It was contended on behalf of the appellants that s. 173 deals only with the rights and obligations inter se of the various persons who may be to a greater or less degree liable to some outside person for expenses, leaving untouched the right of the Council under s. 109 to recover expenses incurred by them in connection with a dangerous structure from any person whom they choose to select, being an "owner" within the definition of that term in s. 5. Mr. Maddocks for the respondents, however, contended further that the question in this case is covered by authority, having already been decided in the case of *Mourilyan* v. *Labalmondiere*. (1) That case arose under the Metropolitan Building Act, 1855, in which s. 73 and s. 3 are substantially in the same terms as those of ss. 109 and 5 respectively of the present Act, while s. 97 of the earlier Act is replaced by the present s. 173. The headnote of that case is: "By s. 73 of the 18th and 19th Victoria, Chapter 122"—that is, the Metropolitan Building Act, 1855—"expenses incurred by the Commissioners in taking down, repairing, or otherwise securing dangerous structures shall be paid by the owner of such structure. By s. 3 'owner' shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year or for any less term, or as a tenant at will. Held, that where the appellants were seised in fee of a building used as a chapel, and which they had let on lease for twenty-one years, they were not liable to pay the expenses incurred as above by the Commissioners, but that the lessee was the 'owner'

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(1) 1 E. & E. 533; 30 L. J. (M. C.) 95.

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within the meaning of the Act, and as such owner was the person intended to be liable." (1)

If that case is to be regarded as a decision that a freeholder is not an "owner" for the purpose of the Act then under discussion it is difficult to follow, and is perhaps inconsistent with the unreported decision of this Court in *London County Council* v. *Brook Cottages* (*Owners of*). (2) But if the decision really turned upon the language of s. 97 which was referred to in argument, though not apparently mentioned in the judgments, it would seem to be in point here and therefore binding upon this Court. The case of *Mourilyan* v. *Labalmondiere* (3) was with others considered and discussed in the case of *Hunt* v. *Harris* (4), where the correctness of the decision was not doubted and, indeed, in the judgment of Byles J., was expressly affirmed. The case of *Caudwell* v. *Hanson* (5) does not materially assist. Upon the whole we think—I say we, because this is the judgment of Humphreys J. as well as my own, and, subject to an addition which will presently be made, the judgment of my Brother Avory—that the case of *Mourilyan* v. *Labalmondiere* (3) governs the present case, and the appellants, if they wish to contest the correctness of that decision, must do so elsewhere. The appeal is accordingly dismissed.

AVORY J. While concurring in the judgment which has just been delivered by my Lord, I wish to add that upon due consideration of the arguments I have come to the conclusion that the carefully reasoned judgment of the learned magistrate in this case should be affirmed.

The inconvenience resulting from this decision in the case of weekly tenants who are occupiers of premises, which are more likely than others to be subject to proceedings under the provisions relating to dangerous structures, is so obvious that I was at first disposed to adopt the argument for the appellants that s. 173 of the London Building Act, 1894, is

(1) 30 L. J. (M. C.) 95.

(2) Unreported. Divisional Court, July 18, 1929.

(3) 1 E. & E. 533; 30 L. J. (M. C.) 95.

(4) 34 L. J. (C. P.) 249.

(5) L. R. 7 Q. B. 55.

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intended only to regulate the obligations inter se of the various owners who come within the definition in s. 5 of the Act and the occupiers, but in view of the fact that s. 97 of the Metropolitan Building Act, 1855, which corresponds to s. 173 of the Act of 1894, was referred to in *Mourilyan* v. *Labalmondiere* (1) by Wightman J., and in the argument, where Mr. Manisty, as he then was, said in the course of his argument: "The provisions in s. 97 affect the whole statute," I think it is not possible to say that that decision is not binding upon us in this case, approved as it was in the case of *Hunt* v. *Harris*. (2)

I do not think the unreported case of *London County Council* v. *Brook Cottages* (*Owners of*) (3), decided under s. 116 of the Act, is necessarily inconsistent with the view that the liability in the present case is governed by s. 173 of the Act, and I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellants: *S. A. R. Preston-Hillary.*
Solicitors for respondents: *Stilgoes.*

(1) 1 E. & E. 533; 30 L. J. (M. C.) 95.

(2) 34 L. J. (C. P.) 249.

(3) Unreported. Divisional Court, July 18, 1929.

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SMITH *v.* METROPOLITAN PROPERTIES COMPANY, LIMITED.

Landlord and Tenant—Business Premises—Compensation for Goodwill—Action brought before Termination of Tenancy—Whether Action maintainable—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 4—*County Court* (*Landlord and Tenant*) *Rules*, 1928, *Order* LB., *rr.* 2, 5.

A tenant of a holding, to which the Landlord and Tenant Act, 1927, applies, cannot commence an action to recover compensation for goodwill under s. 4 of that Act, in a case where the tenancy is terminated otherwise than by notice, until the tenancy has terminated and the tenant has quitted the holding.

APPEAL from the Westminster County Court.

The plaintiff, John Edward Smith, was the assignee of the lease of certain premises in Chancery Lane, consisting of a shop on the ground floor and the basement of No. 79, and also the ground floor shop of No. 13 Bishop's Court, which were used by Smith for his trade of a restaurant keeper. The lease, which was for fourteen years from March 25, 1919, was granted by the defendants, the Metropolitan Properties Company, Ld., who were the landlords of the premises in question, on March 17, 1919. The assignment of the lease to Smith was on May 30, 1922. That lease would expire by effluxion of time on March 25, 1933.

On December 9, 1930, Smith served upon the landlords a notice under the Landlord and Tenant Act, 1927, claiming compensation for goodwill, and also a notice claiming a new lease.

On April 27, 1931, Smith commenced proceedings against the landlords in the Westminster County Court by summons, claiming the grant of a new lease under s. 5 of the Landlord and Tenant Act, 1927, and, in the alternative, 1000*l.* as compensation for loss of goodwill under s. 4 of that Act.

The landlords applied to the Court on May 14, 1931, to strike out the claim on the ground that as framed it was not maintainable. The county court judge held that the tenant must make his election between his claim under s. 5 for a new lease and his alternative claim under s. 4 for compensation for loss of goodwill. The tenant elected to claim compensation.

The landlords then applied to the county court to strike out the tenant's claim for compensation for loss of goodwill on the ground that the action was premature as the tenancy had not terminated and the tenant had not quitted the holding.

The county court judge held that an action claiming compensation under s. 4 of the Act of 1927 (1) could be brought before the termination of the tenancy and before the tenant had quitted the holding.

The landlords appealed.

C. R. Havers for the landlords. This appeal raises a question under s. 4 of the Landlord and Tenant Act, 1927—namely, whether a tenant is entitled to commence an action for compensation for goodwill under s. 4 of the Act before the tenancy has terminated and the tenant has quitted the premises. I submit that a tenant of a holding whose tenancy is not terminated by notice is not entitled to commence proceedings under the Act for compensation for goodwill before the termination of the tenancy and before he has quitted the holding. At the time the tenant commenced his proceedings to recover compensation he was

(1) The Landlord and Tenant Act, 1927, s. 4, sub-s. 1: "The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner—(*i*) in the case of a tenancy terminated by notice, within one month after the service of the notice on the tenant; and (*ii*) in any other case, not more than thirty-six nor less than twelve months before the termination of the tenancy; be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto: Provided that—(*a*) the sum to be awarded as compensation for such goodwill shall not exceed such addition to the value of the holding at the termination of the tenancy as may be determined to be the direct result of the carrying on of the trade or business by the tenant or his predecessors in title, and in determining such addition the tribunal shall, if it is proved that the premises will be demolished wholly or partially, or used for a different and more profitable purpose, have regard to the effect of such demolition or change of user on the value of the goodwill to the landlord; . . . ."

still in possession of the premises, and the lease had still two years to run. The only right of a tenant to compensation for goodwill is under s. 4, sub-s. 1, of the Act of 1927. That section provides that a tenant of a holding shall be entitled at the termination of the tenancy on quitting the holding to be paid by his landlord compensation for goodwill. Until those conditions are fulfilled a tenant is not entitled to bring an action to recover compensation. If the contrary contention prevailed, and a tenant were entitled to bring his action for compensation a long time before the termination of the tenancy and recovered compensation for goodwill, he might then shut up the shop so that at the termination of the tenancy no goodwill attached to the premises and the landlord would have to pay compensation for a non-existent goodwill. A tenant is only entitled to recover compensation if he proves that by reason of the carrying on of the trade or business goodwill has become attached to the premises at the termination of the tenancy; he can only prove that fact after the tenancy has terminated. The person liable to pay compensation is the landlord, and the person entitled to be paid compensation is the tenant. I submit that only the person who is landlord of the premises at the termination of the tenancy is liable to pay compensation, and only the person who is tenant at the termination of the tenancy is entitled to be paid compensation. This point came before the Court of Appeal in *Dale* v. *Hatfield Chase Corporation* (1) under the Agricultural Holdings Act, 1908, s. 11, of which contains a similar provision to s. 4 of the Act of 1927. Bankes L.J. there said (2): "The other question raised by the appeal is a difficult one. It involves a decision upon the point whether the Act imposes the obligation to pay compensation for disturbance upon the landlord only, and whether under the circumstances of this case the tenant had claimed payment of compensation from the right person. . . . . Prima facie therefore the purchasers were the persons and the only persons from whom compensation could be claimed, because it is only

(1) [1922] 2 K. B. 282. (2) Ibid. 291, 292.

on 'quitting the holding' that the tenant becomes entitled to compensation." Scrutton L.J. also said (1): "This appeal raises at least one question of general importance—namely, by whom the compensation due under the Agricultural Holdings Act, 1914, to a tenant is payable when his tenancy is terminated, because his original landlord sells the holding. . . . . The tenant is entitled to compensation under s. 1 [of the Agricultural Holdings Act, 1908] 'at the determination of a tenancy on quitting his holding' from the 'landlord.' The 'landlord' is defined by s. 48, unless the context otherwise requires, as 'any person for the time being entitled to receive the rents and profits of any land.' The compensation is the value of the improvement to an incoming tenant. So far it seems clear that the person who is the landlord when the tenancy determines and the tenant quits his holding is the person to pay compensation for improvements. . . . . As compensation is not due till the end of the tenancy, it seems impossible if the point is insisted on to have an arbitration till the sum is due, and then the other party to the arbitration will be the landlord from whom the sum is due, not the previous landlord to whom notice was given." The principle of the decision in that case is entirely applicable to a case arising under the Landlord and Tenant Act, 1927. Sub-s. 2 of s. 25 of the Act of 1927, which provides that "the designation of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings under or in pursuance of this Act in respect of compensation," means that once proceedings are properly instituted the person sued as landlord remains landlord to the end of the proceedings. The section cannot be read so as to make a person liable as landlord who is not properly liable merely by commencing proceedings before the sum is due. Provisoes (*a*) (*f*) and (*g*) to sub-s. 1 of s. 4 of the Act of 1927 confirm my contention that the material time to be looked at is the termination of the tenancy. Proviso (*a*) refers to goodwill as being the addition to the value of the holding at the termination of the tenancy as the direct result of the carrying on of the trade

(1) [1922] 2 K. B. 294.

or business by the tenant. It also provides that the tribunal shall take into account the fact that the premises will be demolished or used for a different purpose, which facts may not be known till the tenancy is terminated. If the contention on behalf of the tenant is correct and proceedings to recover compensation for goodwill can be commenced nearly three years before the termination of the tenancy, the landlord will be deprived of the defence open to him under provisoes (*f*) and (*g*). Sub-s. 4 of s. 4 provides that "in the absence of agreement between the parties, all questions as to the right to compensation under this section, and as to the amount thereof, shall be determined by the tribunal." Parliament provided that a notice of a claim for compensation should be given by a tenant to his landlord a long time before the tenancy terminated in order that the matter might be settled by agreement, and it is only if the parties fail to agree that litigious proceedings may be brought. If a tenant is entitled to bring proceedings as soon as he has made his claim the intention of Parliament, that the matter shall if possible be settled by agreement, will be defeated. Sect. 1 of the Act of 1927, which deals with a tenant's right to compensation for improvements, contains similar language to that in s. 4, and any decision with regard to a claim under s. 4 will apply equally to a claim under s. 1. The provisions of that section clearly show that it must be proved that the improvement adds to the letting value of the holding at the termination of the tenancy. Further, the cost of putting the improvement into a reasonable state of repair at the termination of the tenancy has to be deducted from the compensation for the improvement. If the proceedings for compensation could be brought before the termination of the tenancy it would be impossible to determine the amount that would have to be spent at the termination of the tenancy to put the improvement in a proper state of repair.

The other side rely, as did the county court judge, upon s. 5 of the Act of 1927, which provides that proceedings under that section shall be brought not less than nine months before the termination of the tenancy. That section is an altogether different section from s. 4, and must be considered quite apart from s. 4. A tenant instead of applying under s. 4 for compensation for goodwill may apply to the landlord for a new lease if " the sum which could be awarded to him under " s. 4 " as compensation for goodwill would not compensate him for the loss of goodwill he will suffer if he removes to and carries on his trade or business in other premises." An application under this section to the tribunal is therefore for the grant of a new lease and not for compensation, and the tenant has to prove certain additional facts to those he would have to prove if he were merely claiming compensation under s. 4. The section goes on to provide that the tribunal shall be precluded from making an order for the grant of a new lease if the landlord proves either of four specified cases, and in that event the tribunal may award such compensation to the tenant as is provided in s. 4. Sect. 5 is a wholly independent section from s. 4. A tenant must elect whether he will claim compensation under s. 4 or claim a new lease under s. 5. If he elects to apply for compensation the proceedings are governed by s. 4, and they must be brought at the termination of the tenancy. On the other hand, if the tenant applies for a new lease in a case where the tenancy is not terminated by notice, the proceedings must be instituted not less that nine months before the termination of the tenancy. There is nothing in s. 5 which is contrary to my contention, as that section deals with an entirely different proceeding in which the tenant only gets compensation in four specified cases which are entirely in the landlord's discretion, where the tribunal is precluded from granting a new lease. Rules were made under the Landlord and Tenant Act, 1927—namely, Order Lb. of the County Court Rules. These Rules provide, r. 5 (1.), that " proceedings for the determination of a right to compensation or relief in lieu of compensation under ss. 1, 4, 5 and 8 of the Act or any of such sections shall be by action commenced by plaint and ordinary summons," and (4.) " No proceedings under s. 1 or s. 4 of the Act shall be commenced until the expiration of

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two months from the date whereon the plaintiff shall have served on the defendant his claim for compensation." That rule was inserted to prevent an action to recover compensation being brought before the expiration of the two months mentioned in s. 2, sub-s. 1 (*d*), and s. 4, sub-s. 1 (*b*), of the Act of 1927. Form 468 annexed to the Rules requires the person claiming compensation under s. 4 of the Act of 1927 to state in his particulars of claim the "date when plaintiff quitted holding." These Rules were considered by the Divisional Court in *Donegal Tweed Co.* v. *Stephenson* (1), when the Court held that the Rules were not intended to alter the times fixed by the statute for the doing of anything. The Rules were never intended to give a tenant the right to bring proceedings for compensation under s. 4 of the Act before the termination of the tenancy. This appeal ought therefore to be allowed.

T. J. Sophian for the tenant. The decision of the county court judge was correct. The landlords are seeking to upset the usual practice under the Landlord and Tenant Act, 1927. A tenant has the right to bring an action for compensation for goodwill under s. 4 of that Act as soon as he has served a claim for compensation. It is true that he cannot, by reason of r. 5 of Order Lb. of the County Court Rules, commence proceedings until the expiration of two months from the date when he served his claim for compensation, and that he cannot recover the fruit of his judgment until the happening of the event on which it is payable—namely, the termination of the tenancy and his quitting the holding—but that does not affect his right. *Hamilton Gell* v. *White* (2) is an authority for the proposition that a tenant acquired a right to compensation for disturbance under s. 11 of the Agricultural Holdings Act, 1908, as soon as the landlord gave the tenant notice to quit. That applies to the present case. If the Act of 1927 was repealed that right would, by reason of s. 38 of the Interpretation Act, 1889, not be disputed. The cases that have been cited which were decided under the Agricultural Holdings Acts do not assist here. Those cases deal with the point as to the person liable to pay compensation where there has been a change in the landlord after the tenant has given notice of his intention to claim compensation. The only thing dealing with the point in the present case is the statement of Scrutton L.J. in *Dale* v. *Hatfield Chase Corporation* (1) that "it seems impossible . . . . to have an arbitration till the sum is due" which was obiter. The decision in that case turned upon s. 11 of the Agricultural Holdings Act, 1908, which provided that "the tenant upon quitting the holding shall . . . . be entitled to compensation for the loss or expense. . . . ." The words "upon quitting the holding" come before "shall be entitled to compensation" and govern the rest of the section. Sect. 4 of the Act of 1927, on the other hand, provides that "the tenant of a holding . . . . shall . . . . be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill." Those words show that the tenant is entitled to receive compensation for goodwill upon the termination of the tenancy and his quitting the holding, but they do not prevent the question as to the tenant's right to compensation and as to the amount of the compensation being investigated before the termination of the tenancy. It is only fair that a tenant should know before the termination of the tenancy what he will receive as compensation for goodwill upon the termination of the tenancy in order that he may be able to acquire another business. A tenant is required by r. 2 (*d*) of Order LB. of the County Court Rules to estimate at least twelve months before the termination of the tenancy what he claims to be entitled to as compensation for goodwill, because he has to state the amount claimed as compensation in his notice of claim. That compensation is based upon the addition to the value of the holding attributable to the trade or business having been carried on there by the tenant. The object of r. 5 (4) of Order LB., which provides that no proceedings for compensation shall be commenced until the expiration of two months from the service of the notice of

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(1) (1929) 141 L. T. 262.

(2) [1922] 2 K. B. 422.

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(1) [1922] 2 K. B. 296.

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claim, is to give the parties an opportunity of coming to terms. If no proceeding can be commenced until after the termination of the tenancy, one would have expected that some provision to that effect would have been included in the rule. The fact that no such provision is included in the rule lends strong support to the contention that that is not the proper construction of s. 4. The language of s. 4 shows that the section is looking forward to the date when the tenancy will be terminated. Sect. 5 is conclusive in favour of the tenant's contention. Under that section a tenant can apply to the tribunal not less than nine months before the termination of the tenancy for the grant of a new tenancy, and the tribunal in certain cases instead of granting a new lease may award compensation for goodwill. If a tribunal has power under s. 5 to award compensation for goodwill at least nine months before the termination of the tenancy, there is no reason why a tribunal should not award compensation for goodwill under s. 4 before the termination of the tenancy. The fact that express power is given by s. 5 to a tribunal to award compensation for goodwill before the termination of the tenancy does not lead to the inference that the absence of such express power in s. 4 prevents a tribunal awarding compensation for goodwill before the termination of the tenancy. There is nothing in the Act of 1927 requiring a tenant to wait till the expiration of his tenancy before commencing proceedings to recover compensation for goodwill. Sect. 4 says that a tenant shall be entitled to be paid compensation at the termination of the tenancy. If an action to recover compensation for goodwill cannot be brought until the termination of the tenancy it cannot be said that the tenant is to be paid compensation for goodwill at the termination of the tenancy.

TALBOT J. This appeal raises a point of practice under the Landlord and Tenant Act, 1927, which is of considerable importance and upon which we are told that county court judges have differed in opinion. It is accordingly desired to obtain a decision of the High Court upon it. There is no need, in these circumstances, to enter into the particular facts of this case.

The point is whether an action by a tenant for compensation for goodwill under s. 4 of the Act of 1927 can be commenced, in a case in which the tenancy is terminable by effluxion of time and not by notice, before the tenancy is terminated and before the tenant has quitted. The judge in the county court from which this appeal is brought has held that an action of that kind can be so commenced, and the landlords appeal against that decision.

The lease under which the plaintiff holds does not expire until the year 1933, and the action in which this question arises was begun in April, 1931. It is obvious, therefore, that it raises the point which I have mentioned.

Obviously the first thing to be looked at is the language of the section of the Act which confers the right—namely, s. 4. That section is: "The tenant of a holding to which this Part of this Act applies"—it is common ground that this plaintiff is within that—"shall, if a claim for the purpose is made in the prescribed manner—(*i*) in the case of a tenancy terminated by notice,"—which is not this case—"within one month after the service of the notice on the tenant; and (*ii*) in any other case, not more than thirty-six nor less than twelve months before the termination of the tenancy." It is quite clear therefore—and this is relied upon by both sides—that what is called in the statute the claim must, in a case of the kind we have before us, be made well before the termination of the tenancy. As to what "the prescribed manner" means we have to look at the Rules which have been issued by the proper authority under the Act and which form Order LB. of the County Court Rules. We find there that a claim under the Act for compensation either in respect of improvements (which is dealt with in another section) or for goodwill, or by a mesne landlord under s. 8, sub-s. 1, of the Act, shall be made in writing signed by the claimant, his solicitor or agent, and shall contain various things, and amongst others, "if compensation is claimed, a statement of the amount claimed." Perhaps it is rather odd that the draftsman should have begun the rule by saying, "a claim under the Act for compensation," and should have ended it by saying "if compensation is claimed"; but if compensation is claimed, every claim for compensation under this Act must contain a statement of the amount claimed, and it must be made at least twelve months before the termination of the tenancy. It is also necessary to look at r. 5, which states in para. 1 that "proceedings for the determination of a right to compensation or relief in lieu of compensation under ss. 1, 4, 5 and 8 of the Act or any of such sections shall be by action commenced by plaint and ordinary summons"—that is not unimportant. (3.) "The person claiming compensation shall be the plaintiff and the person from whom the compensation is claimed shall be the defendant." (4.) "No proceedings under s. 1 or s. 4 of the Act shall be commenced until the expiration of two months from the date whereon the plaintiff shall have served on the defendant his claim for compensation." Then s. 4 of the Act, having dealt with the claim and pointed out the first condition for the recovery of compensation, goes on in these words: "The tenant of a holding to which this Part of this Act applies shall . . . . be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto." It is quite clear, on the face of that enactment, that the right of the tenant to be paid his compensation does not arise until the tenancy is ended and the holding quitted. Prima facie, if any one is claiming the payment of a sum of money, the right to sue for that sum does not exist until the sum is due. That is an ordinary rule of law that applies to every action in which it is sought to recover a sum of money due on the occurrence of a particular event. I think, after a careful examination of the statute, one comes back to the simple position that, failing some clear indication to the contrary, no sum of money can be recovered by action unless that action be begun after the money is due. The person to be sued is the person who has to pay, and that is the landlord who, by the definition contained in s. 25 of the statute, is the "person who, under [the] lease, is, as between himself and the tenant, ... for the time being entitled to the rents and profits of the demised premises payable under the lease." Of course, to be strictly accurate, where the right to be paid compensation arises only at the termination of a tenancy, which expires by effluxion of time, at that actual instant the relation of landlord and tenant ceases to exist. There is, however, no question that the words "tenant" and "landlord" in the Act refer to persons in those relations, and "the person . . . . for the time being entitled to the rents and profits" must, I think, necessarily mean the landlord at the end of the tenancy, because it is not ascertained who that person is until the tenancy has actually ended.

That, I think, is the first consideration which is material for the decision of this question, and I think, as I have already said, after an examination of this Act of Parliament, it remains far the most important consideration. I think it will not be unfair to state the question as being whether there is anything in this Act which prevents those words from having the meaning which prima facie they must bear. There are various indications which support that construction; there are others which, without saying anything more of them at the moment, may be thought to tend in the other direction. Probably no Act of Parliament can be found in which there is not some apparent difficulty in applying it according to the meaning which ultimately turns out to be the true one. One of the things which go to support the prima facie construction of the section is the phrase "if he proves." If this proof could be completed before the happening of the event on which the compensation becomes payable, the natural wording would be "if he proves or has proved." That is not conclusive, but it is something. I do not think it is disputed that the tenant must prove that goodwill has become attached at the date when the right to compensation accrues, and when therefore it is payable. The words "could be let" in the last line but one of that paragraph of the section also point in the same direction. It has been pointed out that the inquiry before the tribunal must be directed to the time after the termination of the tenancy and when in fact the premises could be let. If that matter could be gone into beforehand, you would expect to find some other language used in the section. Of course, as I pointed out during the argument with regard to the supposed inconvenience and the like, which was urged by counsel on behalf of the landlords, it is not true to say that this compensation could not be assessed before the event if necessary. We all know that in compensation cases, and other actions, the tribunal has often to take into consideration the probable effect in the future of whatever the matter may be. But certainly the assessment of compensation can be done with more accuracy and far more satisfactorily if, when the inquiry is embarked upon, the state of things when the right to the compensation accrues is not merely estimated but known, there being no doubt that all these things have to be ascertained as at the termination of the tenancy. That is the necessary implication which is also found in the first proviso of this section: "(*a*) the sum to be awarded as compensation for such goodwill shall not exceed such addition to the value of the holding at the termination of the tenancy as may be determined to be the direct result of the carrying on of the trade or business by the tenant or his predecessors in title. . . . ." I have no doubt the framer of the proviso had in mind the ascertainment of the value of the holding at the termination of the tenancy and of the addition to it due to the carrying on of a trade or business by the tenant or his predecessor as existing things. I do not think it is necessary to go through all the clauses of the section, but there are indications in the rest of the section, particularly, perhaps, in proviso (*g*), which deals with cases in which the tenancy has expired by effluxion of time and the premises are required for any of the purposes enumerated in that proviso, that is to say, for the purposes of a government department, or a local or public authority, or a charity, or a statutory or public utility company. In all those cases the right to compensation is defeated if the premises, wherever the tenancy has expired by effluxion of time, are required for any such purpose. If the compensation could be ascertained beforehand, either the right would be defeated or it would not. If in fact when the tenancy expired the premises were required for any such purpose, then if the right to compensation were defeated the cost of the ascertainment beforehand would be thrown away, and if it were not defeated the effect of the proviso would be nullified. I think that a similar inference is to be drawn from a provision in s. 4, which strikes one on the first reading as somewhat peculiar —namely, as to the length of time which must elapse between the making of the claim in which the amount of compensation claimed must be mentioned and the event on which it becomes payable. The length of the period must, I think, be designed to give ample time to both parties to consider their position under the various rights which each of them has under this Act of Parliament, and to a great extent it would be defeating the objects with which it appears to have been framed if a tenant could bring an action for the amount set out in the claim within two months after making the claim, and (it might be) long before the tenancy terminated.

We were also referred by counsel on both sides to s. 1, which deals with the right of the tenant to compensation, not for goodwill, which is the matter with which we have to deal, and which is controlled by s. 4, but for improvements. Counsel relied upon the word " adds " in s. 1, where the section says, " compensation in respect of any improvement . . . . which at the termination of the tenancy adds to the letting value of the holding." The general frame of this section is similar to, and much of its language is identical with the language of, s. 4, which deals with goodwill, and it certainly seems a fair comment to say that if proceedings to recover compensation were allowed to be commenced before the termination of the tenancy the more natural language would be "adds or will add." On the other side it is said that it is equally true to say that if the claim must be decided after the end of the tenancy the wording should be "adds or has added." But, I think, this overlooks the fact that even a disputed claim, which necessarily takes time, relates back to the time at which the condition pointed at by the Act is ascertained. I think that the word "adds," so far as it has any bearing on this appeal, is substantially stronger for the landlord than for the tenant. It has also been pointed out that proviso (*b*) of the same sub-section, which allows a deduction from the compensation payable for an improvement of the cost of putting the work constituting the improvement into a reasonable state of repair, would be very much less protection for the landlord if the compensation for the improvement could be ascertained before the tenancy expired. As to the cost of repair, it assumes that the extent of the dilapidation is known, and it also assumes that the cost of putting it right is known. Those things obviously, both or either, may vary considerably within a period much less than that which, on the tenant's construction, would be allowed between the determination of the compensation and the event on which it is payable. It is quite clear that a dishonest tenant, or even a negligent tenant, might easily cause a miscarriage of justice by recovering compensation for an improvement as being in perfect repair, and then allowing it to decay before the time at which the compensation was payable. That would in effect wholly deprive the landlord in such a case as that; and in many cases, even without any such gross misconduct on the part of the tenant, would deprive him to a great extent of his protection under that proviso.

Now we come to what counsel for the tenant mainly relied upon as supporting his case, apart from the general considerations of convenience, as to which I will content myself with saying that, as far as I can judge, they seem to me to apply more on the side of the landlord than on that of the tenant; though no doubt something can be said for either view. Apart from those, I think the main thing he relies upon is s. 5 of the Act of 1927. That section deals with the right of a tenant to a new lease in certain cases. Of course the whole of this Act is a rather notable innovation in our law, though as to compensation for goodwill, and still more for improvements, it only extends principles which have been already recognized. But when one comes to s. 5, I do not say there is no precedent to be found for it anywhere, but certainly something is being introduced which is probably correctly described as novel. A tenant under his lease is entitled only to remain in the premises for the definite term to which he has agreed when he entered into the lease; but s. 5 gives him a right to claim an order against the landlord obliging him to give him a new lease, whether he wants to or not. There are various provisions and safeguards which it is unnecessary to deal with now. But the main condition is that the tenant must show that the provisions as to compensation in the statute, and in particular under s. 4, "would not compensate him for the loss of goodwill he will suffer if he removes to and carries on his trade or business in other premises," and it allows him, "in lieu of claiming such compensation"—now these words are important—"at any time within the period allowed for making a claim under the said section"—that is the provision in s. 4 which says: "not more than thirty-six nor less than twelve months before the termination of the tenancy"—"serve on the landlord notice requiring a new lease of the premises at which the trade or business is carried on to be granted to him." I particularly desire not to say anything in deciding this case which may be thought to affect other matters of procedure under this somewhat intricate Act which may have to be decided hereafter, and I desire to say definitely that I do not decide, and I have no right to decide, anything of that kind. I am merely dealing with the effect of s. 5 upon the construction of s. 4. It has been held in the county court that a tenant cannot make a claim under this section in the alternative; that is to say, that he cannot claim a new lease and in the alternative compensation; but that he must elect which remedy he will choose. If he does not claim a new lease his rights are those which are defined by s. 4. But s. 5 does deal with compensation, and it deals with it in this way. Sub-s. 2 of s. 5 provides: "Where such a notice is so served, the tribunal, on application being made for the purpose either by the landlord or by the tenant not less than nine months before the termination of the tenancy, or, where the tenancy is terminated by notice, within two months after the service of the notice, may, if it considers that the grant of a new tenancy is in all the circumstances reasonable, order the grant of a new tenancy for such period (being a term of years absolute) not exceeding fourteen years and on such terms as the tribunal may determine to be proper, but if the tribunal is precluded on any of the grounds mentioned in paragraph (*b*) of the following sub-section from making such an order the tribunal may award such compensation as is provided under the last foregoing section." It is said that inasmuch as these proceedings, that is to say, proceedings in which a new lease is claimed, must necessarily be brought before the termination of the tenancy, that authorizes, and in a proper case compels, the tribunal to exercise the power conferred upon it to award compensation before the end of the tenancy; and that because compensation under that section may be awarded, and ought to be awarded in a proper case, before the termination of the tenancy, the same construction must be put upon s. 4. It appears to me that this is an entirely illegitimate argument. I do not see how s. 5, which deals with an exceptional and novel matter, and makes this provision as incidental to the right of the tribunal to order a new lease to be granted, can modify the construction of s. 4, in which the question of a new lease does not arise at all. Parliament obviously considered that it might be hard upon a tenant, where the tribunal was prevented from granting him a new lease, which they otherwise would have granted, if that prevented him from getting without further action an award of compensation. It is quite true that whatever difficulty there may be in assessing compensation beforehand would arise under that section. But it seems to me contrary to the principles of sound construction to apply that provision, introduced obviously to deal with an anomalous and novel situation, to defeat what I think is clearly the prima facie meaning of s. 4, which is quite free from any such consideration. I think that is made clear when one looks at the conditions under which such compensation can be allowed under s. 5. There are two matters which prevent the granting of a new lease, and it is only if the tribunal is precluded from granting a new lease on one of those grounds that the right to compensation arises. Now what are those two things? They are to be found in sub-s. 3 of s. 5. The first is a matter within the cognizance of the tenant: "Where the tenant is the applicant, the grant of a new lease under this section shall not be deemed to be reasonable—(*a*) unless the tenant proves that he is a suitable tenant and that he would be entitled to compensation under the last foregoing section, but that the sum which could be awarded to him under that section would not compensate him for the loss he would suffer if he removed to and carried on his trade or business in other premises." If he fails to prove that, he fails to get the new lease, and he cannot then take advantage of sub-s. 2, because it is only if the tribunal is precluded on any grounds mentioned in para. (*b*) of sub-s. 3 that the right to compensation in that proceeding arises. When we look at (*b*) we see what is the reason: "(*b*) if the landlord proves—(i) that the premises are required for occupation by himself, or, where the landlord is an individual, for occupation by a son or daughter of his over eighteen years of age; or (ii) that he intends to pull down or remodel the premises; or (iii) that vacant possession of the premises is required in order to carry out a scheme of re-development; or (iv) that for any other reason the grant of such a lease of the premises would not be consistent with good estate management . . . ." All those things are for the protection of the landlord and they deal with matters which primarily, at any rate, are in the cognizance of the landlord, and as to which in many cases the tenant could have no knowledge. Parliament thought, naturally, that if one of these things, which were for the protection of the landlord, was all that prevented the grant of a new lease under s. 5, it would not be fair to put the tenant to further expense, and that the tribunal might in that proceeding award such compensation as is provided under s. 4.

I think it is worth noticing that in *Gough's Garages, Ld.* v. *Pugsley* (1) Greer L.J. expressly repudiated the contention that ss. 4 and 5 ought to be read together, the ground being that the two sections are wholly distinct, although there are of course references to s. 4 in s. 5. An argument was founded on para. (*a*) of sub-s. 3 of s. 5, which I have already read. No doubt para. (*a*) sets the tenant a hard task and sets the tribunal a hard task. The tenant has to prove that "he is a suitable tenant and that he would be entitled to compensation under the last foregoing section"—s. 4—"but that the sum which could be awarded to him under that section would not compensate him for the loss he would suffer if he removed to and carried on his trade or business in other premises." Obviously there are difficult questions involved in that inquiry, and I need not enlarge upon it. I confess I do not understand how that is an argument for importing into s. 4 those difficulties, or any of those which are involved in the determination beforehand of what compensation will be payable at a later date.

We have been referred by both sides to certain cases decided on the Agricultural Holdings Acts. The language of some of those Acts, and in particular the language of the Act of 1908, upon which the decision of the case of *Dale* v. *Hatfield Chase Corporation* (2) turns, is very similar to that of the Landlord and Tenant Act, 1927, which we have to construe. Sect. 11 of the Agricultural Holdings Act, 1908, deals with compensation for improvements, and it says that "the tenant upon quitting the holding shall, in addition to the compensation (if any) to which he may be entitled in respect of improvements, ... be entitled to compensation for the loss or expense directly attributable to his quitting the holding, ..." I do not think it is necessary to discuss those cases further. They were very fully brought to our attention by counsel on both sides. I do not think it is disputed that the language, both of Bankes L.J. (1) and of Scrutton L.J. (2) in *Dale* v. *Hatfield Chase Corporation* (3) appears to support the landlord's case in the present appeal. Those statements were made in actions arising under a different Act, and they are probably more or less obiter dicta, but of course we have considered them and they have supported us in the conclusion to which we have come. I have had some difficulty in following the argument which was based on the case of *Hamilton Gell* v. *White* (4) in which the question was as to the effect of the repeal of the Act of 1908 by the later Act of 1920. In that case proceedings had been initiated under the earlier Act, and had not come on for decision until after that Act had been repealed and the new Act had taken its place. In substance, all that was decided there was that if the tenant had within the time limited taken the proper steps under the statute which had been repealed, his right to continue those proceedings under the repealed Act was preserved by the application of s. 38 of the Interpretation Act, 1889. I do not understand how that affects this matter.

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(1) [1930] 1 K. B. 615.

(2) [1922] 2 K. B. 282.

I do not think I need say any more. A considerable number of other topics have been entered upon by the counsel on both sides and we have had every assistance from them that was possible. I think it really comes back to the simple question which I began by mentioning—namely, whether there is anything in this Act or elsewhere which prevents s. 4 of the Landlord and Tenant Act, 1927, from having the meaning which, on the face of it, it appears to have—namely, that no action can be commenced for the recovery of compensation under that section until it is due.

(1) [1922] 2 K. B. 292.

(2) Ibid. 296.

(3) [1922] 2 K. B. 282.

(4) [1922] 2 K. B. 422.

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In my opinion, therefore, the appeal should be allowed and judgment entered in the county court for the defendant company.

MACNAGHTEN J. I am of the same opinion. Sect. 4 of the Landlord and Tenant Act, 1927, confers upon the tenant of a holding to which the First Part of that Act applies, namely, leasehold premises used for the purposes of trade or business, the right, subject to the conditions specified in the section, to be paid by his landlord compensation for goodwill. He acquires this right "at the termination of the tenancy on quitting the holding." Sub-s. 4 of that section provides that "In the absence of agreement between the parties, all questions as to the right to compensation under this section, and as to the amount thereof, shall be determined by the tribunal." The tribunal specified in the Act is the county court of the district in which the holding is situate; and it is provided that Rules may be made for regulating the proceedings under the Act. Rules of Court have been so made, which provide that proceedings for the determination of the right to compensation under s. 4 of the Act shall be "by action commenced by plaint and ordinary summons." If, therefore, the landlord and tenant are unable to agree as to the right to compensation or as to the amount of the compensation, then the matter is to be determined by a Court of justice and the proceedings for determining the matter are litigious. The question which is raised by this appeal is whether the tenant is entitled to commence these litigious proceedings before the termination of his tenancy. According to the argument of the respondent the tenant is entitled to commence proceedings against his landlord at any time after the expiration of two months from date of the service of notice of claim; and, since notice of claim may be served three years before the termination of the tenancy, the tribunal may, if the argument be well founded, be called upon to assess the compensation long before the event has happened on which it is payable. It was urged before us that it would be very convenient for the tenant to know, before he quits the holding, what sum, if any, he is to receive on quitting it. No doubt it would often be convenient to know what will happen in the future; but is it possible for the Court to determine the right to compensation and to assess the amount of the compensation until after the termination of the tenancy? And even if the Court were to attempt that arduous task the assessment must, it would seem, be provisional: since the order assessing the compensation would, I presume, provide that either party should be at liberty to apply to the Court to amend or vary its decision in case of anything happening between the date of assessment and the date of the termination of the tenancy which might be thought to increase or diminish the value of the goodwill. In my opinion, if the parties are unable to agree as to the right to, or the amount of, the compensation, then after the event has happened on which the right to compensation arises—namely, after the termination of the tenancy and after the tenant has quitted the holding, then and not till then the tenant can commence proceedings for the purpose of having his right to compensation determined.

I agree the appeal should be allowed.

Appeal allowed.
Action dismissed.

Solicitors for landlords: *Charles Stevens & Drayton.*
Solicitors for tenant: *Jennings & Chater.*

R. F. S.

1931
Oct. 23.

GUILFOYLE *v.* PORT OF LONDON AUTHORITY.

[1930. G. 1960.]

Highway—Swing-bridge uniting Two Highways—Non-repair—Non-feasance—Liability for Injuries—Surveyor of Highways.

A dock company, under statutory powers, constructed a swing-bridge which united two highways. The public, by the statute, had the right of access to the bridge except when open for the passage of vessels, and the company by the statute was bound to keep it in repair. At the material time the bridge was the property of the defendants, the Port of London Authority, to whom had been transferred the rights and obligations of the company. They negligently failed to keep it in repair, whereby the plaintiff was injured while crossing it. The defendants contended that the bridge was a highway; that under their liability to repair it they were in the position of a surveyor of highways; that they had been guilty of non-feasance only and were, consequently, not liable in damages to the plaintiff:—

Held, that the bridge was not a highway, and that the defendants were liable for the injury caused through breach of their statutory duty to keep it in repair.

FURTHER consideration of an action tried by Humphreys J. and a jury.

The plaintiff, John Guilfoyle, claimed damages from the defendants, the Port of London Authority, for injuries sustained by him while crossing a swing-bridge which connected two highways in the defendants' dockyard, the Connaught Road Bridge, Silvertown. The bridge was built in pursuance of s. 7 of the London and St. Katharine Docks Company Act, 1875 (38 & 39 Vict. c. cliii.). Under s. 3, sub-s. 1, of the Port of London Act, 1908 (8 Edw. 7, c. 68), the docks, including this bridge, were taken over by the defendants, who had been constituted under s. 1. By the Port of London (Consolidation) Act, 1920 (10 & 11 Geo. 5, c. clxxiii.), s. 378 (17*b*), the defendants "shall maintain and keep in perpetual repair" the said bridge to which, by s. 380, the public was given access except when open for the passage of vessels.

The plaintiff, passing over the bridge, fell over a nail projecting above the level of the footway and was injured.

and the jury found that the cause was the failure of the defendants to keep the bridge in repair, and awarded damages. Upon this the plaintiff moved for judgment.

Wishart for the defendants. Judgment should be entered for the defendants. Where anybody is liable, either at common law or by statute, to repair a highway no action for damages at the suit of a private person caused by the neglect to repair or non-feasance of the person liable will lie: *Russell* v. *Men of Devon* (1); *Cowley* v. *Newmarket Local Board.* (2)

[*Lyme Regis Corporation* v. *Henley* (3); *Rundle* v. *Hearle* (4); and *Sydney Municipal Council* v. *Bourke* (5) were also referred to.]

This bridge connected two highways, and Parliament in authorizing its building and imposing the liability to repair it cannot have contemplated two standards of liability, one for the highways connected and another for the highway over the bridge. The mere fact that the liability to repair the highways was transferred to the defendants does not, in itself, render them liable to an action for non-feasance: *Maguire* v. *Liverpool Corporation.* (6) The only way to prevent the mischief arising from non-feasance is by indictment.

Martin O'Connor for the plaintiff. The general proposition as to non-liability for non-feasance in the case of highways is not disputed. But this bridge is not a highway, it is only a structure erected for the conveyance of railway trains and foot-passengers, and it remains the private property of the defendants. No doubt it was constructed as part of the consideration for the grant of power to build the docks, but it is still only a structure, and private property. The public has a statutory right of way over the bridge, which is a right higher than that of an invitee or licensee; its right is not the same as that over a highway. Even were it possible to dedicate it as a highway, no such dedication has taken place. This case is analogous to that of *Parkinson* v. *Garstang and Knott End Ry. Co.* (1), where a railway company, under a statutory obligation to erect and maintain sufficient gates between the highway which it crossed and the railway line, was held liable for damage caused by its failure to do so. This is one bridge and the defendants would clearly be liable for damage caused by non-feasance in respect of the railway portion of it.

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(1) (1788) 2 T. R. 667.
(2) [1892] A. C. 345.
(3) (1832) 3 B. & Ad. 77.
(4) [1898] 2 Q. B. 83.
(5) [1895] A. C. 433, 439.
(6) [1905] 1 K. B. 767.

[*Charman* v. *South-Eastern Ry. Co.* (2) was also referred to.]

The defendants are liable for breach of their statutory duty to repair the bridge imposed by s. 378 (17*b*) of the Act of 1920: *David* v. *Britannic Merthyr Coal Co.* (3); *Dawson & Co.* v. *Bingley Urban Council.* (4)

[*Butler* (*or Black*) v. *Fife Coal Co., Ld.* (5) was also referred to.]

Wishart in reply. The Legislature has not shown an intention to impose a liability on the defendants for non-feasance, therefore the defendants are not liable: *Municipality of Pictou* v. *Geldert* (6); *Cowley* v. *Newmarket Local Board.* (7)

[*Cumberland* (*Inhabitants*) v. *Regem* (8); *M'Kinnon* v. *Penson* (9) and *Blundy, Clark & Co.* v. *London and North Eastern Ry. Co.* (10) were also referred to.]

HUMPHREYS J. In this case, if I thought that any advantage would accrue to the parties by my taking time to consider my judgment and put it into writing, I would do so, but having arrived at a decision after an argument for which I am grateful to both members of the Bar, I think it is probably better in the interests of everybody that I should state now what my view of the matter is.

In this case the plaintiff on March 18, 1930, was going home from his work. His way lay across a swing-bridge called the Connaught Road Bridge, Silvertown. He fell and was injured. The persons responsible for the repair of that bridge are admittedly the defendants, the Port of London Authority, who are the proprietors of the bridge. In answer to questions the jury found that the injuries of the plaintiff were caused by his striking his foot on a nail projecting above the level of the footway, causing him to fall, and that the cause of the accident was the negligence of the defendants in failing to maintain the footway in good repair and condition; they found damages 153*l.* Upon those findings Mr. O'Connor asked me to enter judgment for the plaintiff, but Mr. Wishart objected that judgment ought to be entered for the defendants on the ground that they are an authority who are not liable in law to a private individual who suffers damage by reason of any non-feasance on their part. His proposition is, that this was an act of non-feasance and nothing more. The non-feasance is quite clear; therefore, that proposition has to be examined.

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(1) [1910] 1 K. B. 615.
(2) (1888) 21 Q. B. D. 524.
(3) [1909] 2 K. B. 146.
(4) [1911] 2 K. B. 149.
(5) [1912] A. C. 149, 165.
(6) [1893] A. C. 524.
(7) [1892] A. C. 345.
(8) (1803) 3 Bos. & P. 354.
(9) (1853) 8 Exch. 319.
(10) [1931] 2 K. B. 334.

It is necessary to look just a little bit at the facts of the case. This Connaught Bridge is a swing-bridge. It was originally built apparently some time in 1875 as a result of s. 7 of the London and St. Katharine Docks Company Act, 1875. Sect. 7 of that Act required the London and St. Katharine Docks Company, who were the owners at that time of the property on which now stands this bridge, to do as follows: "In order to provide means of communication between existing or future public roads on either side of the Victoria Dock Extension the company shall . . . . make a new carriage road from the existing level." Then it goes on to describe the new carriage road. That is not this bridge. Then it goes on to make certain provisions which rendered it necessary to make this bridge, and accordingly it was so made. Mr. Wishart contends that at that time there was a public highway over the place where the bridge now stands, and it is endeavoured to support that contention by certain maps. I can only say that I have formed no opinion about the matter one way or the other. The maps are very confusing, and I do not think any of them do show clearly that there was any public highway over this place. On the other hand, I am certainly not prepared to say that they show anything to the contrary. I cannot, therefore, decide this case on that ground, although I think it is unfortunate that the matter has not been cleared up by evidence, because in my view it is by no means unimportant to know whether at the time this bridge was made it was made merely in substitution for an ordinary public highway, part of which was cut away and this bridge substituted for it. It may be so. It may be, on the other hand, that there was originally a public highway leading from what is now West Ham North down to a place near to where this Connaught Bridge now begins. It may be that there was at that time a public highway leading from the south where North Woolwich now is to the place, or near to the place, where the southern end of this bridge now is. It may be, for aught I know, that the space in between was a marshy swamp intersected by cuts as they are called, and that in truth there was no continuous highway there. I do not know how that may be.

The bridge being constructed as it was, it remained the property of the London and St. Katharine Docks Company until some later period when it became the property of a company called the London and India Docks Company. In 1908, the Port of London Authority, the defendants in this action, were constituted by s. 1 of the Port of London Act, 1908, which by s. 3, sub-s. 1, authorized and required them to take over the undertaking of the London and India Docks Company, so that they became the owners of, and liable to repair, this bridge. Then followed the Port of London (Consolidation) Act, 1920, which deals generally with the position of the defendants.

The Port of London Authority is undoubtedly a public authority with public duties of great importance, including the management of the river, and among other things—and it is these duties with which this case is immediately concerned—it has the management of the docks which formerly belonged to various private concerns. The bridge in question is mentioned in two sections of the Act of 1920. By s. 378 it is provided that the Port Authority " shall maintain and keep in perpetual repair and in their present form and condition the works following," and then follows a list of what are called works. They include the said swing-bridge as well as other things such as capstans, and shelters for passengers and so forth. This swing-bridge, which is No. 17*b* in the schedule, if I may call it so, to that section, is referred to as one of the works "carrying Connaught Road over the passage between the Royal Victoria Dock and the Royal Albert Dock." Then in s. 380 there is a special provision as to the Connaught Road Bridge. That bridge, as distinct from all the other bridges, all of which have sections devoted to them, is referred to in this way: "The swing bridge carrying Connaught Road over the passage between the Royal Victoria Dock and the Royal Albert Dock shall be maintained by the Port Authority in such a manner that fifteen feet of the width of such bridge shall at all times be appropriated to the road and the Port Authority shall at all times continue to permit such swing bridge and the roadway thereon to be used free of charge by the public in connection with any road or roads which may communicate or be thereafter made to communicate therewith and shall at all times maintain such roadway in good repair and condition. Provided always that the said swing bridge shall be kept closed except when required to be opened for dock traffic." Then there are references to the lines of railway which, in fact, cross that bridge. The bridge itself is divided into two parts. The greater part of it is a railway bridge, and the smaller part of it consists, in the middle of it, of the roadway. The evidence was that the roadway is made of iron plate, no doubt screwed down to some foundations, and on either side of that roadway there is a footpath which is between 4 and 5 feet wide, and is made of timber, held down by 5-inch nails. It must be taken that the finding of the jury was that, owing to the timber of that pathway being allowed to get into disrepair, the timber round one of the nails was worn away so that the nail stuck up beyond the level of the pathway. The plaintiff put his foot against that nail and so sustained his injuries.

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Humphreys J.

That being the bridge and the history of the bridge, Mr. Wishart contends that the defendants, who were the owners of it, and who are clearly liable to repair it are, nevertheless, not liable in an action for damages at the suit of a person who, as a result of their negligent conduct in failing to keep it in repair, has been injured. I think it right to draw attention, first of all, to the fact that the defendants cannot set up here any sort of defence based on the principle that they are a public authority who are not trading for profit, or who are not allowed to make profit out of the undertaking which Parliament has entrusted them with. Such arguments have, from time to time, been addressed to the Courts, but in the year 1866 the well known case of the *Mersey Docks and Harbour Board* v. *Gibbs* (1) was decided, the headnote of which is as follows: "The principle on which a private person, or a company, is liable for damages occasioned by the neglect of servants, applies to a corporation which has been entrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person, or the company, are not applicable to the use of the individual corporators or to that of the corporation, but are devoted to the maintenance of the works, and, in case of any surplus existing, the tolls themselves are to be proportionably diminished." That case is quite a sufficient authority for the proposition that the defendants, who are permitted to impose tolls and do impose tolls for the use of these docks, cannot escape liability on the ground that they are a public authority who are in the position of merely carrying out their duties under an Act of Parliament in the interests of the public at large. I merely refer in passing to the fact that very lately the Court of Appeal, having a somewhat similar argument addressed to them to that which was unsuccessfully addressed to the House of Lords in the case to which I have referred (1), again dealt with the matter in the case of *Blundy, Clark & Co.* v. *London and North Eastern Ry. Co.* (2) The Court there had to deal with the case of a railway company which had taken

(1) (1866) L. R. 1 H. L. 93.

(2) [1931] 2 K. B. 334.

over the duties and liabilities of a canal company. As a result of the negligence of the defendants, who had negligently failed to maintain one of the gates of one of the locks, damage and loss had been occasioned. One of the arguments which was addressed to the Court was that the company were not liable merely for non-feasance. Scrutton L.J., in that case, after referring to the case of the *Mersey Docks and Harbour Board* v. *Gibbs* (1) said (2): "The principle was in that case extended, from a company maintaining works for its own profit derived from tolls receivable under statute from all the public using the navigation, to a public authority not authorized to make profit out of its tolls. These cases show that the defence that the defendant company, being by statute bound to use reasonable care to maintain a public navigation and entitled to receive tolls from the users of the navigation, are not liable for non-feasance, cannot succeed." Then Greer L.J. expressed the same view in referring to the cases and said (3): "[These cases] are all cases in which it was held that failure to perform a statutory duty by a company taking tolls for its services rendered them liable to pay damages to persons who suffered special damage as a result of the company's breach of their statutory duty."

Then Mr. Wishart says that the defendant authority is in the same position in regard to an action for damages based upon alleged non-feasance as a surveyor of highways, and he relies upon the very well-known principle of law that a surveyor of highways, or any public authority whose position is analogous to that of a surveyor of highways, is not liable to pay damages to a person who has been injured by its failure to repair. He says the failure to repair this bridge was the failure of a statutory authority, a public authority, whose duty to repair was analogous to that of a surveyor of highways. The principle which has been for a long time disputed was, perhaps, finally decided in the case of *Cowley* v. *Newmarket Local Board*. (4) It is not necessary to refer further to that case. Very shortly afterwards in a case in the Privy Council, *Municipality of Pictou* v. *Geldert* (1), the effect of that case was summed up in the opinion of their Lordships, delivered by Lord Hobhouse, who, referring to the case of *Cowley* v. *Newmarket Local Board* (2) said (3): "The latest English case is that of *Cowley* v. *Newmarket Local Board* (2), decided in the House of Lords. It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shown that the legislature has used language indicating an intention that this liability shall be imposed." He was dealing in that case, as do, indeed, all these cases, of which many have been cited to me, with the case of a public authority charged with the maintenance of public highways. They are local boards, surveyors of highways, county councils, municipal authorities, and so forth. Lord Hobhouse also said (3): "By the common law of England, which is also that of Nova Scotia, public bodies charged with the duty of keeping public roads and bridges in repair, and liable to an indictment for a breach of this duty, were nevertheless not liable to an action for damages at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair." His Lordship goes on to say: "This was first held in a case in which the inhabitants of a county were sued": *Russell* v. *Men of Devon.* (4) The ground of that, decision was that they were not a corporation, and, therefore there was a technical difficulty in suing them, but Lord Hobhouse thought that the decision also went "on the substantial ground of non-liability." In fact, non-liability has been held in later cases to be the real ground of that ancient decision. Therefore, in this case, what I have to do is to look at the facts and see whether in my judgment the statute imposing the liability to repair this bridge does indicate an intention that the persons upon whom the liability is imposed should be in the position of a surveyor

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(1) (1866) L. R. 1 H. L. 93.
(2) [1931] 2 K. B. 351.
(3) [1931] 2 K. B. 360.
(4) [1892] A. C. 345.

(1) [1893] A. C. 524.
(2) [1892] A. C. 345.
(3) [1893] A. C. 527.
(4) 2 T. R. 667.

of highways, or whether there is an indication to the contrary, so that they are responsible to any person in regard to whom injuries are proved to have been suffered as a result of their failure in the performance of their statutory duty.

A number of cases were cited. One case which was relied upon by Mr. Wishart particularly was the case of *Maguire* v. *Liverpool Corporation.* (1) The case is interesting as an instance of the transfer of duties of a surveyor of highways to an authority, where the authority certainly have the immunity which formerly attached to the surveyor of highways. It is interesting to notice from the headnote that in that case: "The defendant corporation were declared to be the surveyors of highways for the borough of Liverpool; the control of the streets was vested in them; and they were empowered to form or pave streets with such materials as they should think fit." Then it was enacted by an Act, which was a special or private Act (9 & 10 Vict. c. cxxvii.), that (s. 58) the corporation "shall be liable to be indicted at Common Law for the want of the sufficient repair of any public highway within the said borough, in the same manner as any person or persons liable to the repair of such highways was or were before the passing of this Act." The headnote continues: "An action was brought against the corporation for injuries caused to the plaintiff's horse by the negligence of the defendants, in that they had not properly repaired a road. The want of repair was admitted, but there was no evidence of misfeasance on the part of the defendants." It was held: "That the mere fact that a new body was created with the duty to repair roads did not of itself impose on the new body a liability to actions for damages caused by non-repair of roads; and that if and so far as *Hartnall* v. *Ryde Commissioners* (2) laid down a rule to the contrary, it must be taken to have been overruled. No fresh liability was created when the duty to repair was transferred by the Act of 1846; and the action could not be maintained. Under the modern authorities a transfer to a public corporation of the obligation to repair roads does not of itself render the corporation liable

(1) [1905] 1 K. B. 767.

(2) (1863) 4 B. & S. 361.

to an action for damages for non-feasance as distinguished from misfeasance; and the question whether such a liability is imposed upon them must be determined by the language of the particular Act of Parliament." There were other cases which were cited to me, but I do not think there can be any real doubt as to the general principle of law which applies. If the defendants are in the position of a surveyor of highways, they are not liable in this action. However unsatisfactory the law may be—and I am only saying what has been said repeatedly by other judges and indeed by many members of the House of Lords, when I say the law is unsatisfactory in this respect—it is the law, and I am bound to pronounce it. The question here is, whether this is a case of a public highway, or a highway the duty to maintain which is thrown upon the defendant authority much in the same way as a duty of repairing is thrown upon the surveyor of highways.

In my judgment this swing-bridge is not in the ordinary sense a highway at all. It certainly is not a public highway. It has never been dedicated to the public, and is the private property of the defendant authority upon their private ground. What the land was originally, I do not know, but the position now is that there is a public road, an ordinary public highway, going down to the north end of this bridge. There is another public road which comes from the south up to the south end of this bridge. Inasmuch as there is a large piece of water on one side which is called the Albert Dock, and on the other side which is called the Victoria Dock, it was necessary to have something to connect these two public highways. If this were an ordinary bridge always in position I should not hold that merely because it was a bridge the road surface ceased to be an ordinary highway. But it is not. It is a swing-bridge. That means that the rights of the public are to go over that swing-bridge when it happens that the swing-bridge is in a position to enable them to do so. They have no right to have the swing-bridge put in a position to enable them to go over it at any particular time, except that the statute of 1875 has by s. 7 provided that the swing-bridge shall be kept closed, that is to say, available for the use of the public, except at such times as it is required to be open for the use of barges and so forth. But such a work, as it is described in s. 378 (17*b*) of the Act of 1920 appears to me to be in quite a different position from a portion of an ordinary public highway. I do not lay great stress upon the word "public," because in my view the same law would apply to a private highway, or rather to a highway along which at all times the public had a right of passing and re-passing without let or hindrance. I do not think that the law would cease to apply to it merely because it was on private property, and there had been no dedication to the public of the surface of the road. But it seems to me that this work is totally different from the ordinary highway. Mr. O'Connor addressed an argument to me which I think had some substance in it when he said: Is it really the law, that part of this bridge being used for two railway lines, the Port of London Authority would be liable, as they clearly would be, for a failure to maintain that part of the bridge which failure resulted in a railway accident, or in somebody being injured on that part of the bridge, but that when you come to the other part of the bridge, it being all one bridge and it all swinging together, the position of the defendant authority is that it is immune as to that part of the bridge from proceedings being brought against it because it is in the position of a surveyor of highways? The truth is that the whole of this structure is about as unlike an ordinary highway as one can well conceive. As I have said, the roadway is constructed of iron plates. The larger part of the bridge is merely a railway bridge. The pathways, too, are unlike the ordinary modern pathway in that they are made of wood.

The case is a very difficult one because the proposition which has been contended for by Mr. Wishart is a very wide one. It may be that he is right, but I can only say that in my view his contention is too wide. His contention is that wherever there is a liability thrown upon any one to repair a road that person ceases to be liable for any act of non-feasance in respect of the non-repair of that road. I think that proposition is putting the matter too high. In this case, I think, the position of the defendant authority is that of persons who have a statutory duty to repair, maintain and keep in order, and look after generally a great number of things, including several swing-bridges, some of which no doubt connect with public highways. I am not in the least satisfied that this swing-bridge itself is a public highway or that the liability to maintain it puts the defendants in the position of public authorities, such as surveyors of highways, who are charged with the maintenance of public highways. Therefore, for these reasons, I think the defendants, on whom lies the onus of satisfying me, have failed to satisfy me that they are immune from the ordinary consequences of an action in which a person has proved to the satisfaction of the jury that he has suffered injuries as a result of the negligence of the defendants. There will be judgment for the plaintiff for the amount found by the jury.

Judgment for plaintiff.

Solicitors for plaintiff: *J. Nixon Watts & Co.*
Solicitor for defendants: *J. D. Ritchie.*

W. L. L. B.

SCHLESINGER AND JOSEPH *v.* MOSTYN.

1931
Nov. 23.

[1931. S. No. 2720.]

Practice—Marriage Settlement—Covenant to pay Life Assurance Premiums—Breach—Payment by Trustees of Settlement—Claim against Covenantor for Repayment—Procedure—Order XIV.*—Claim for Damages—Measure of Damages.*

In a marriage settlement the husband transferred to the trustees a policy of life assurance and covenanted to pay the premiums. The husband failed to pay a premium, and the trustees, in the exercise of their powers under the settlement, paid it out of the trust funds, and then claimed repayment of the amount from the husband although there was no express covenant by the latter to repay:—

Held, that the claim, under an implied obligation to repay, must be for damages for breach of covenant and not for a debt or liquidated demand, and that consequently the procedure under Order XIV. was not appropriate.

Held, also, that the trustees were entitled to substantial and not merely nominal damages—namely, the amount of the premium paid by them.

TRIAL of an action before McCardie J.

The plaintiffs, Gerald Leonard Schlesinger and Francis George Joseph, were the trustees of the marriage settlement of the defendant, Sydney Mostyn, and his wife, then Ruth Bertha Schlesinger, dated June 17, 1919. By the deed the defendant transferred to the trustees absolutely a policy of assurance on his own life for 2500*l.* in the Scottish Provident Institution upon trusts in favour of his wife and children. The defendant therein covenanted with the trustees that he would not " by any act or omission cause or allow the [policy] hereby assigned . . . . to become void . . . . and will . . . . from time to time duly pay all moneys payable and do all things necessary for keeping on foot the said [policy]." It was further provided that the trustees might in their absolute discretion apply any of the income of the settled funds in making any payments for keeping on foot the policy, but that it should not be obligatory on them to enforce any covenant in the settlement on the part of the husband in reference to any policy, nor to make any payments as aforesaid, and any omission to do so was not to

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SCHLESINGER AND JOSEPH v. MOSTYN.

constitute a breach of trust. The trustees were empowered in their discretion to sell or surrender the policy. There was no express covenant by the husband, the defendant, to reimburse the trustees any payment made by them as aforesaid to keep the policy on foot.

The defendant, in breach of his covenant, failed to pay the premium on the policy falling due on May 24, 1930, which the trustees subsequently paid in order to keep the policy on foot, and they now claimed the amount of the premium, 94*l.* 3*s.* 4*d.*, as money due from the defendant plus a sum of 4*l.* 14*s.* 1*d.*, the amount of a penalty imposed by the insurance company.

The matter originally came before Hawke J. on a specially indorsed writ on October 12, 1931. Hawke J. gave the plaintiffs leave to amend by adding an alternative claim for damages for breach of covenant, and sent the case to the non-jury list, all questions of costs being referred to the court of trial. The plaintiffs, by their amended claim, claimed alternatively the above amounts as damages. The defendant, while denying damage, paid one shilling into court as sufficient to satisfy the claim.

Fortune for the plaintiffs. This is a claim for a debt within the meaning of Order III., r. 6, therefore the proper procedure under Order XIV. was followed. But if the claim only sounds in damages then the plaintiffs are entitled to substantial damages—namely, the amount paid to the insurance company.

[*Hey* v. *Wyche* (1) and Mayne on Damages, 10th ed., p. 240, were referred to.]

H. G. Robertson for the defendant. This was not a case for the procedure under Order XIV., not being a claim for a debt or liquidated demand in money within the meaning of Order III., r. 6 (1.). It can only be a claim for damages for breach of covenant: *Warburg* v. *Tucker*. (2) In any case the damages would only be nominal: *National Assurance and Investment Association* v. *Best*. (3) This policy had a

(1) (1842) 12 L. J. (Q. B.) 83.

(2) (1858) E. B. & E. 914, 928.

(3) (1857) 2 H. & N. 605.

considerable surrender value, and the trustees had power either to surrender or sell it. Moreover they were not liable if they did not enforce the covenant or pay the premiums. The amount of the premium is not the criterion of loss.

[McCARDIE J. No, not necessarily.]

There is no evidence of loss other than that, and there is no covenant by the defendant to repay the trustees in circumstances such as the present.

Fortune in reply. The action as originally brought was properly framed under Order XIV., the premium being a liquidated amount and paid in mitigation of damages, which could not be less than that. Pollock C.B. in the *National Assurance* case (1), in a passage cited with approval in *Warburg* v. *Tucker* (2), said: "If the covenantees had paid [the premiums] in order to keep up the policy . . . . there might have been ground for substantial damages."

[Mayne on Damages, 10th ed., at p. 239, was also referred to.]

The cases of *National Assurance and Investment Association* v. *Best* (3) and *Browne* v. *Price* (4) were cases where the policies were assigned as security for a debt, and have no application to a case like the present of an assignment of property.

McCARDIE J. This action is brought by the trustees of a marriage settlement dated June 17, 1919, just before the marriage of the defendant with Miss R. B. Schlesinger. The deed is a long one, and it recites that the defendant had taken out certain life policies, among which is the policy in question, and it provides for the transfer of this policy to the trustees upon the trusts of the settlement. The settlement provides that the trusts shall be for the benefit of the settlor, his wife and children, of whom three were afterwards born. The substantial object of the settlement was to deal with property and to deal with it for the benefit of the persons I have named, for of course the interposition of trustees was only machinery. The policy was for 2500*l.*, and the premium payable in respect of it was 94*l*. 3*s*. 4*d*. per annum. The only clause which bears on the point in issue is clause 14. By that clause the husband, the defendant, covenanted that he would not by any act or omission allow the policy to become void, that he would pay the premiums and do all things necessary to keep the policy on foot. Then comes a paragraph dealing with the event of the defendant failing in his obligations, for it provides that the trustees may apply any of the income of the trust fund in making any payments necessary to keep the policy on foot. Finally the clause provides in substance, firstly, that it shall not be obligatory on the trustees to enforce any covenant in the deed by the husband with reference to the policy. That enabled the trustees to relieve the defendant of his obligations in special circumstances. Secondly, it provides that if the trustees consider that circumstances render it expedient they may sell or surrender the policy. It is to be noted that there is no express covenant by the defendant to repay to the trustees any sums which they may have paid under that clause, but it is quite clear to my mind that there is an implied obligation on the defendant to make good to the plaintiffs that which they have done in fulfilling the obligation which he primarily ought to have fulfilled. In fact the trustees, owing to the defendant's default, paid the premium of 94*l*. 3*s*. 4*d*. falling due on May 24, 1930, and in this action they seek to recover that sum. They have therefore, in the exercise of their discretion, considered it their duty to pay what the defendant covenanted to pay but did not pay.

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(1) 2 H. & N. 615.

(2) E. B. & E. 914, 929.

(3) 2 H. & N. 605.

(4) (1858) 4 C. B. (N. S.) 598.

In the first instance the trustees claimed on a specially indorsed writ as for a debt. Hawke J. allowed them to amend by adding a claim for damages, and sent the case to the non-jury list. Mr. Robertson for the defendant has submitted several points. Firstly, he says that this action can only take the form of a claim for damages, and that, consequently, the procedure by specially indorsed writ was not the proper procedure. Secondly, he says that in any event the damages would be nominal only, and thirdly, that in any event the damages should not be the full amount of the premium.

With regard to the first contention, it seems to me to rest on a technicality. I confess that if I was not bound by authority I should wipe out many of the subtleties which exist in English law, for I think they are often inconsistent with modern conditions. But this case is not free from authority. Mr. Robertson relied on *Warburg* v. *Tucker* (1), decided in 1858. That was a case in which I think in substance the Court, consisting of Williams J. and Martin, Bramwell and Watson BB., gave a ruling which shows that the claim in the present action must be a claim for damages. In *Warburg* v. *Tucker* (1) the defendant had assigned by deed to the plaintiff as security for debt an assurance on the life of himself and of his wife, and had covenanted to pay the premiums. The defendant did not do so, and the plaintiff paid them. There was an express covenant by the defendant to repay the sums so paid by the plaintiff. Watson B. pointed out (2) that "The covenant is to keep up the insurance by payments to a third party; not to pay money to the plaintiff at all. The claim of the plaintiff on this breach of covenant would sound only in damages: but these are not necessarily of any particular amount; they might be anything from a farthing upwards. If the plaintiff had paid the premiums on the policy and the defendant had repaid him, then the damages on the first breach might be a farthing. You really may put the possibility fifty ways." In view of that case I think as a matter of technicality the claim here should have been for damages, not for debt. Consequently it follows that this action was not properly one for the procedure under Order XIV.

That brings me to the next point—namely, whether the plaintiffs are entitled to nominal damages only. Mr. Robertson cited first *National Assurance and Investment Association* v. *Best* (3), a case where the defendant had failed to pay premiums in breach of his covenant to do so. There the Court undoubtedly held that, as it did not appear that the plaintiffs had sustained any loss by the defendant's neglect to keep up the policies, the measure of damages was not the amount of the premiums but nominal damages only. In my view that decision turned on the particular circumstances. It was a mere case of an indenture charging insurance policies being given to secure a debt, and it is obvious that in such cases the damages might sometimes be nominal and in some cases not. That case has no application to a case like the present case where property is concerned. The next case cited was *Browne* v. *Price.* (1) There again, on the facts, the Court held that the plaintiffs were not entitled to more than nominal damages. But that case, where a debt was secured by a mortgage and by a policy of assurance, was again one of a mere security for a debt, and moreover it turned, or certainly ought to have turned, on one particular provision in the deed—namely, that in case the defendant should fail to pay the premium, it should be awful for the plaintiffs to pay it and to charge the amount upon the mortgaged property thereby charged. Therefore the Court should have held that the deed had provided a special method by which the plaintiffs could get repayment of the premium. Upon reading the judgments in that case I am satisfied that that was the ratio decidendi.

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(1) E. B. & E. 914.
(2) E. B. & E. 928.
(3) 2 H. & N. 605.

The present case, I hold, is not one for nominal damages at all, but the damages are substantial, and, upon the facts, the plaintiffs are entitled to recover the full amount of the premium. I think I am justified in holding that in view of the observations of the Court in *Hey* v. *Wyche* (2) and the passages in Mayne on Damages, 10th ed., pp. 240 et seq., and in Arnold on Damages, 2nd ed., at p. 58. I therefore give judgment for the plaintiffs for the amount claimed.

Judgment for plaintiffs.

Solicitors showing cause: *Tamplin, Joseph, Ponsonby, Ryde & Flux.*

Solicitors in support: *Montagu's & Cox & Cardale.*

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(1) 4 C. B. (N. S.) 598.

(2) 12 L. J. (Q. B.) 83.

W. L. L. B.

HORSFIELD *v.* BROWN.

1931
July 29.

[1931. H. 1514.]

False Imprisonment—Maintenance Order obtained by Wife—Failure of Husband to comply with—Warrant for Apprehension of Husband—Omission from Warrant of Words "unless the said sum and costs and charges be sooner paid"—Validity of Warrant—Arrest by Constable without Warrant in his Possession—Legality of Arrest—Tender of Sum due to Constable—Refusal to accept—Detention of Husband after Tender—Liability of Constable—Constables Protection Act, 1750 (24 *Geo.* 2, *c.* 44), *s.* 6—*Bastardy Laws Amendment Act*, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 4—*Summary Jurisdiction* (*Married Women*) *Act*, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 9—*Affiliation Orders Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 6), *s.* 6, *sub-s.* 1 —*Criminal Justice Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 44—*Bastardy* (*Forms*) *Order*, 1915 (*St. R. & O.*, 1915, *No.* 208), *Sch.*, *Form No.* 18—*Bastardy* (*Forms*) *Amendment Order*, 1921 (*St. R. & O.*, 1921, *No.* 1383), *r.* 2.

The plaintiff having left his wife and two children, his wife obtained a maintenance order under the Summary Jurisdiction (Married Women) Act, 1895, for the payment by him of a weekly sum. The plaintiff having failed to comply with the order, his wife made complaint to a magistrate at D., which was within the county of Chester, that 19*l.* 12*s.* 6*d.* was then in arrear under the order, and thereupon the magistrate issued a warrant, addressed to each and all of the constables of the county of Chester, commanding them to apprehend the plaintiff and convey him before a court of summary jurisdiction at D. to be dealt with according to law. The warrant showed on its face that 19*l.* 17*s.* was payable by the plaintiff and was in the form prescribed by the Bastardy (Forms) Order, 1915, but it did not contain the words "unless the said sum and all costs and charges be sooner paid" which were directed to be inserted in such warrants by the Bastardy (Forms) Amendment Order, 1921. The warrant was delivered to the defendant, the superintendent of police at D., and some time later the plaintiff was arrested by a constable acting under the defendant's orders. The plaintiff was taken in custody through the streets and placed in a cell by the defendant's order. At the time the arrest was effected the warrant was in the defendant's possession at the police station and was not in the possession of the constable who made the arrest. The plaintiff's father immediately after the arrest tendered 19*l.* 17*s.* to the defendant and asked for his son's release, but the defendant refused to accept the money. The plaintiff's solicitor then sent a letter to the defendant enclosing the 19*l.* 17*s.* and demanding the plaintiff's release, but the defendant did not open the letter and the plaintiff was kept over-night in the cell. The plaintiff was brought on the following morning before a court of summary jurisdiction at D., when the solicitor's letter was produced and found to contain 19*l.* 17*s.*, whereupon the magistrates ordered the plaintiff's immediate release. The plaintiff brought an action against the defendant for false imprisonment, and the jury returned a verdict in the plaintiff's favour and awarded 175*l.* as damages for the arrest, and 175*l.* as damages for the unlawful detention at the police station after the tender of the money :—

Held, (1.) that the warrant was invalid by reason of the omission therefrom of the words "unless the said sum and all costs and charges be sooner paid," inasmuch as the provision in the Summary Jurisdiction (Married Women) Act, 1895, that "the payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation," refers not to the date when that Act was passed, but to the date when it was sought to enforce the order, and in the present case at that date the Bastardy (Forms) Amendment Order, 1921, requiring the insertion of those words in the warrant, was in force;

(2.) that the arrest was wrongful, because the constable had not the warrant in his possession at the time he effected the arrest;

(3.) that the defendant was not protected by s. 44 of the Criminal Justice Act, 1925, for in order to obtain that protection the warrant must have been lawfully issued, and the person apprehended must have been charged with an "offence," whereas in fact the warrant was invalid and the plaintiff was not charged with an "offence" within the meaning of the Criminal Justice Act, 1925;

(4.) that the defendant was not protected by s. 6 of the Constables Protection Act, 1750, in respect of the arrest, but that he was protected by that Act in respect of the unlawful detention at the police station after the tender of the money, inasmuch as the defendant in detaining the plaintiff was merely acting in obedience to the warrant.

ACTION tried at the Manchester Assizes before Macnaghten J. and a special jury.

The plaintiff, Norman Varney Horsfield, claimed to recover damages for false imprisonment from the defendant, James Brown, who was a superintendent in the Cheshire County Constabulary, and was in charge of the police in the borough of Dukinfield in the county of Chester.

The plaintiff, by his statement of claim, alleged that he was on February 23, 1931, wrongfully and unlawfully arrested at the house of his father, 190 King Street, Dukinfield, by a police constable under the direction and control of the defendant, and was taken through the streets of the borough of Dukinfield to the police station at Dukinfield; that on arrival at the police station he was informed that he was arrested for failure to pay arrears under a maintenance order, and that the amount due was 19*l.* 17*s.*; and that he was then locked in a cell.

The plaintiff further alleged that an inspector of police under the direction and control of the defendant then informed the plaintiff's mother that she must pay the full amount or the plaintiff would be detained all night; that the plaintiff's mother tendered the said amount of 19*l.* 17*s.* to the defendant, but that the defendant wrongfully refused to accept the money and release the plaintiff; that the plaintiff's father and mother afterwards tendered the said sum of 19*l.* 17*s.* to the defendant and demanded that the plaintiff should be released, but that the defendant again refused to accept the money and/or release the plaintiff, and that he became very abusive and threatened to put the plaintiff's father in the cells also.

The plaintiff further alleged that his solicitor then wrote a letter to the defendant demanding the release of the plaintiff, and that the letter was placed in an envelope together with the said sum of 19*l.* 17*s.* and handed to a police constable at the Dukinfield police station under the control of the defendant by the plaintiff's father, who informed the police constable of the contents and purport of the letter, and requested the same be delivered to the defendant immediately.

The plaintiff further alleged that the defendant wrongfully and unlawfully imprisoned the plaintiff until the morning of February 24, when he was brought before a court of petty sessions sitting at Dukinfield police court and placed in the dock; that the defendant then produced or caused to be produced the said envelope and ordered the plaintiff to open it; that the plaintiff paid the money to an official of the court and that the justices ordered his release, but that the defendant unlawfully prevented the plaintiff from leaving the court by the public entrance and ordered and/or caused him to be taken out by way of a staircase leading out of the dock to the police station, and he was then allowed to go free.

The plaintiff alleged that by reason of the premises he had been seriously injured in his credit and reputation and dignity, and he claimed damages.

The defendant, by his defence, admitted that the plaintiff was arrested by a police constable under his direction and control, and that plaintiff was imprisoned until February 24, 1931, until he was brought before the court of petty sessions sitting at Dukinfield police court, and also admitted that the plaintiff was placed in the dock.

The defendant said that the plaintiff was lawfully arrested and detained and brought before the court of petty sessions by virtue of and in obedience to a warrant which was lawful upon the face of it and which he, the defendant, was bound to obey; that he did no more than he was bound to do and was authorized to do by the warrant.

The defendant admitted that certain moneys were paid by or on behalf of the plaintiff at the police court and that the release of the plaintiff was ordered by the justices, but he denied that the plaintiff was prevented from leaving the court by the public entrance as alleged.

The defendant denied that the plaintiff was entitled to the relief claimed or any relief for the reasons alleged. He further relied upon the provisions of s. 6 of the Constables Protection Act of 1750.

The warrant was as follows:—

"In the County of Chester.

"Petty Sessional Division of Dukinfield.

"To each and all of the constables of the County aforesaid.

"Whereas information and complaint have this day been made upon oath before me, the undersigned, one of His Majesty's justices of the peace for the County aforesaid, by Phyllis Gwendoline Horsfield, of 11, Crescent Road, Dukinfield, in the County aforesaid (hereinafter called the complainant), that by an order duly made in that behalf by the Court of Summary Jurisdiction sitting at Dukinfield in the County of Chester on the tenth day of January, 1929, one Norman Varney Horsfield, of 190 King Street, Dukinfield, in the County of Chester, clerk, the husband of the complainant, was ordered to pay from thenceforth to the complainant through Mr. Allen Howard under the provisions of s. 30 (1.) of the Criminal Justice Administration Act, 1914, the weekly sum of one pound, together with the weekly sum of two shillings and six pence for the maintenance of each of the two children named in the said order while under the age of sixteen years, and should also pay to the complainant the sum of twelve shillings and six pence for the costs of the Court and of the complainant incurred in obtaining such order, and that the payments directed to be made by the said order have not been made according thereto by the defendant, and that there is now in arrear for the same the sum of 19*l.* (nineteen) pounds twelve shillings and six pence.

"These are therefore in His Majesty's name to command you and every of you the said constables forthwith to apprehend the defendant and convey the defendant before the Court of Summary Jurisdiction sitting at the Court Room, Chapel Street, Dukinfield in the County first aforesaid, to answer the premises, and to be dealt with according to law.

"Given under my hand and seal this sixth day of February, 1931, at Dukinfield in the County first aforesaid.

Arrears	£19	0	0
Costs on Order . . .		12	6
Warrant		2	0
Cost of execution of Warrant .		2	6
Total . .	£19	17	0

(Sgd.) H. D. Bryce.

Justice of the Peace for the County first aforesaid."

The jury assessed the damages for the arrest of the plaintiff at 175*l.*, and they assessed the damages for the subsequent detention at the police station after the tender of the money at the like sum, but they returned a verdict in favour of the defendant on the issue raised by the plaintiff's allegation that after he had been discharged by the justices he was not allowed to go free but was compelled to return under restraint to the police station.

The facts are summarized in the headnote and are fully set out in the judgment.

Hemmerde K.C. and *W. F. N. Perry* for the plaintiff.

Neville Laski K.C. and *C. T. B. Leigh* for the defendant.

The arguments sufficiently appear from the judgment.

MACNAGHTEN J. This action, which was tried with a special jury, was brought by the plaintiff, Mr. Norman Varney Horsfield, against the defendant, Mr. James Brown, the superintendent of police at Dukinfield in Cheshire, to recover damages for false imprisonment. It raises questions of some importance with regard to the enforcement of maintenance orders made under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39).

The facts which gave rise to the plaintiff's claim, so far as they are material for the purpose of determining the questions of law arising in the case, were not in dispute. On August 4, 1925, the plaintiff married his wife, Phyllis Gwendoline Horsfield, and there are two children of the marriage. After living together for about three years the plaintiff separated from his wife and went to live with his parents at Dukinfield. Thereupon Mrs. Horsfield took proceedings against the plaintiff before the magistrates at Dukinfield to obtain a maintenance order under the Summary Jurisdiction (Married Women) Act, 1895, and on January 10, 1929, she obtained an order for the payment of the weekly sum of 25*s.* for the maintenance of herself and her two children. Sect. 9 of that Act provides as follows: "The payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order for affiliation." The Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4, provides for the enforcement of affiliation orders. The words of the section, so far as they are material, are as follows: "If at any time after the expiration of one calendar month from the making of such order as aforesaid it be made to appear to any one justice, upon oath or affirmation, that any sum to be paid in pursuance of such order has not been paid, such justice may, by warrant under his hand and seal, cause such putative father to be brought before any two justices, and in case such putative father neglect or refuse to make payment of the sums due from him under such order . . . . such two justices may, by warrant under their hands and seals, direct the sum so appearing to be due, together with such costs, to be recovered by distress and sale of the goods and chattels of such putative father . . . . but if upon the return of such warrant, or if by the admission of such putative father, it appear that no sufficient distress can be had, then any such two justices may, if they see fit, by warrant under their hands and seals, cause such putative father to be committed to the common gaol or house of correction of the county, city, borough, or place where they have jurisdiction, there to remain, without bail or mainprize, for any term not exceeding three calendar months unless such sum and costs, and all reasonable charges attending the said distress, together with the costs and charges attending the commitment and conveying to gaol or to the house of correction, and of the persons employed to convey him thither, be sooner paid and satisfied."

The plaintiff failed to comply with the order which had been made against him, and on February 6, 1931, Mrs. Horsfield made complaint on oath before Mr. H. D. Bryce, one of the magistrates at Dukinfield, that the sum of 19*l*. 12*s*. 6*d*. was then in arrear under the order. Thereupon Mr. Bryce issued a warrant addressed to each and all of the constables of the county of Chester commanding them forthwith to apprehend the plaintiff and convey him before a court of summary jurisdiction at Dukinfield to be dealt with according to law. The warrant showed on the face of it the total sum payable by the plaintiff—namely, 19*l*. 17*s*., being as to 19*l*. 12*s*. 6*d*. the arrears of maintenance due to Mrs. Horsfield, and as to 4*s*. 6*d*. the costs of the warrant and its execution.

By s. 6, sub-s. 1, of the Affiliation Orders Act, 1914 (4 & 5 Geo. 5, c. 6), it is provided as follows: "The Local Government Board"—now the Ministry of Health—"may issue such new or altered forms of proceedings in matters of bastardy as they shall deem necessary or expedient for giving effect to the existing Acts relating to such proceedings as amended by this Act." Pursuant to the provisions of that Act the Local Government Board issued a statutory order, entitled "The Bastardy (Forms) Order, 1915".(St. R. & O., 1915, No. 208), prescribing (inter alia) the form of warrant for the apprehension of a putative father under s. 4 of the Bastardy Laws Amendment Act, 1872; and by another statutory order, entitled "The Bastardy (Forms) Amendment Order, 1921" (St. R. & O., 1921, No. 1383), the Minister of Health, as successor to the Local Government Board, in pursuance of the powers conferred on him by the Affiliation Orders Act, 1914, directed that this form should be amended by the insertion of the words "unless the said sum and all costs and charges be sooner paid" after the words "to answer the said complaint." The warrant issued by Mr. Bryce was in the form prescribed by the former statutory order (St. R. & O., 1915, No. 208); it did not contain the words prescribed by the amending statutory order (St. R. & O., 1921, No. 1383); and one of the questions of law to be considered in this case is whether the omission of the words, "unless the said sum and all costs and charges be sooner paid," rendered the warrant invalid.

The warrant was duly delivered to the defendant Mr. James Brown, the superintendent of police at Dukinfield, and on the afternoon of Monday, February 23, one of the constables stationed at Dukinfield, Samuel Thomas Jones, in accordance with directions given to him by the defendant, arrested the plaintiff at his father's house in that town and took him in custody through the streets to the police station, a distance of about 500 yards. At the time when the constable effected the arrest, the warrant was in the possession of the defendant at the police station, and the question therefore arises whether —assuming the warrant was valid—the fact that at the time of the arrest the warrant was at the police station and was not in the possession of the constable making the arrest, rendered the arrest illegal. At the police station the plaintiff was by order of the defendant placed in one of the cells, and there he remained until the next morning, when he was brought before the magistrates and discharged. In the meantime, however, Mr. Horsfield, senior, had bestirred himself to procure the plaintiff's release. Having ascertained that the amount due on the warrant was 19*l*. 17*s*., he consulted Mr. Grundy, a well known Manchester solicitor, who resided at Dukinfield. In accordance with the advice given to him by Mr. Grundy, Mr. Horsfield, senior, went at once to the police station and tendered 19*l.* 17*s.* to the defendant and asked for his son's release. If the warrant had contained the words "unless the said sum and all costs and charges be sooner paid," the defendant would no doubt have accepted the money and released his prisoner; but, since the warrant did not contain those words, he refused to do so, and in taking this course he was fortified by the opinion of the clerk to the magistrates, whom he had consulted on the matter. Mr. Grundy, on hearing from Mr. Horsfield, senior, that the defendant would not accept the money and release the plaintiff, sent a formal letter to the defendant enclosing 19*l.* 17*s.* and demanding the plaintiff's release, but the defendant did not think fit to open the letter, and the plaintiff spent the night in the cell. The following morning the clerk to the magistrates took steps to convene a Court. Two magistrates were brought to the police court, which adjoins the police station. The plaintiff was brought from the cells and charged in the words of the statute, "that he had neglected or refused to pay" the 19*l.* 17*s.* To this charge the plaintiff replied that the defendant had received that sum of money on the previous evening. The defendant traversed this allegation, but admitted that he had received a letter which might contain the money. So the letter was produced and opened, and it was found to contain 19*l.* 17*s.* in lawful money. The magistrates then ordered the immediate release of the plaintiff, as by law they were bound to do. The plaintiff alleged that after he had been discharged by the magistrates he was not allowed to go free, but was compelled to return under restraint to the police office where some property which had been taken from him when he was arrested was restored to him, but the jury returned a verdict for the defendant on that issue.

Since it might eventually be established that the arrest of the plaintiff was lawful, but that his detention at the police station after the tender of the money due from him was unlawful, or that the arrest was unlawful but that his subsequent detention was lawful, I directed the jury to assess the damages for the arrest and for the subsequent detention separately. The jury assessed the damages for the arrest at 175*l*., and they assessed the damages for the detention at the police station at the like sum. The circumstances of the case well warranted substantial damages such as the jury awarded.

The first question that arises in this case is, was the warrant issued by Mr. Bryce invalid by reason of the omission of the words "unless the said sum and all costs and charges be sooner paid"? Must those words be inserted in a warrant issued for the enforcement of a maintenance order made under the Summary Jurisdiction (Married Women) Act of 1895? The words of the Act of 1895 are: "The payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation." Mr. Laski, on behalf of the defendant, contended that the word "is" in that section refers to the date when the Act received the Royal Assent, July 6, 1895, and that this section should be read as meaning that the payment of any sum of money directed to be paid by any order under that Act may be enforced in the same manner as the payment of money under an order of affiliation was enforceable on July 6, 1895. On the other side it was argued that the word "is" does not refer to the date when the Act was passed but to the date when it is sought to enforce the order, and in my view that construction of the section is the right one.

The statutory order (St. R. & O., 1921, No. 1383) which directs that a warrant issued under s. 4 of the Bastardy Laws Amendment Act, 1872, must contain the words "unless the said sum and all costs and charges be sooner paid," also provides that nothing in the Order is to invalidate any warrant previously issued, a provision which implies that a warrant issued after the date of the Order which does not contain those words would be invalid. I therefore think that the warrant issued by Mr. Bryce ought to have contained the words prescribed by the statutory order (St. R. & O., 1921, No. 1383), and that the omission of those words rendered the warrant invalid.

But even if the warrant for the arrest of the plaintiff had been a valid warrant, his arrest was wrongful, because by the common law the constable could not lawfully make the arrest unless he had the warrant with him at the time. In *Galliard* v. *Laxton* (1), a case which was tried in the Court of Queen's Bench, the headnote is : " A police constable who makes an arrest under a warrant from a justice of the peace for disobedience to a bastardy order, is bound to have the warrant in his possession at the time ; and this although the warrant was in the possession of his superior officer at the station house, and although the officer making the arrest was not called on to show it." The judgment in that case was delivered by Wightman J., and he concludes by saying (2) : " We are, upon the whole, of opinion that the officers making the arrest ought to have had the warrant with them ready to be produced in case it should be required, and that, not having it, they were not justified in making the arrest." The decision in that case was followed by the late Lord Hannen (then Hannen J.) at the Hertford Assizes in the case of *Reg.* v. *Chapman* (3), and was referred to again in the case of *Codd* v. *Cabe.* (4) The Court on that occasion consisted of Bramwell B., Mellor and Denman JJ. It was a case stated by the Justices of the Peace for Devonshire under 20 & 21 Vict. c. 43. The appellant, Codd, had been summoned to answer an information charging him with trespass in pursuit of conies, and as he did not appear in obedience to the summons a warrant was issued for his apprehension. The respondent was a police officer to whom the warrant was directed, and he, not having it in his possession, attempted to arrest the appellant, who thereupon committed an assault upon him. The Court held that the appellant could not be convicted upon an information charging him with assaulting the respondent in the execution of his duty, because the warrant was not in the possession of the respondent at the time of the attempted arrest. Bramwell B. said (1): "The warrant to arrest the appellant had been issued in respect of an offence punishable upon summary conviction; and I think that *Galliard* v. *Laxton* (2) is in point to show that, as regards the possession of the warrant by a police officer at the time of taking into custody, no difference exists between arrest upon civil process and arrest for crime other than felony. In the judgment delivered in the case which I have mentioned, the distinction is drawn between arrest for felony and arrest upon other grounds; and the reason is that a police officer can always arrest and detain a person whom he reasonably suspects to have committed felony, but as a general rule, subject to certain exceptions mostly created by statute, he cannot arrest without warrant a person not charged with felony. I have always held it to be clear law that a person not charged with felony shall have the opportunity of seeing the warrant when he is taken into custody; and I should have arrived at the conclusion that the present appellant is entitled to judgment, even although there had been no authority in his favour. We have consulted some of the other judges, and they agree with us that the decision of the justices cannot be upheld. Although the appellant displayed great violence, yet it is not expressly found by the justices that he used more force than was necessary to prevent his apprehension, which was unlawful; and, therefore, as the case stands, he has not been guilty in law of even a common assault." Mellor and Denman JJ. gave judgments to the same effect, Denman J. concluding his judgment by saying that the respondent, the constable, was not acting in the execution of his duty, and the information was not proved, and therefore the conviction must be quashed.

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(1) (1862) 2 B. & S. 363.
(2) Ibid. 373.
(3) (1871) 12 Cox, C. C. 4.
(4) (1876) 1 Ex. D. 352.

Then it is said that although by the common law constable Jones was not entitled to arrest the plaintiff, the provisions of s. 44 of the Criminal Justice Act, 1925, justified him in doing so. That section provides: "Any warrant lawfully issued by a justice for apprehending any person charged with any offence may be executed by any constable at any time notwithstanding that the warrant is not in his possession at that time, but the warrant shall, on the demand of the person apprehended, be shown to him as soon as practicable after his arrest." In order to avail himself of the provisions of that section it is therefore necessary for the defendant to show that the warrant was a warrant lawfully issued by a justice, and also that the person to be apprehended was a person charged with an "offence" within the meaning of that statute. I have already decided that the warrant issued by Mr. Bryce was not a valid warrant, and I also think that the plaintiff was not a person charged with an "offence" within the meaning of the Criminal Justice Act, 1925. The statute, it is to be observed, is a statute that deals with the administration of criminal justice to the exclusion of any other subject; and in such a statute the word "offence" would seem to import an act or omission punishable under the criminal law. The plaintiff had not committed any crime. All that was charged against him was that he had neglected or refused to pay the weekly sum which he had been ordered to pay to his wife. His failure to comply with that order was not punishable by any Court in any way. The case of *Robson* v. *Spearman* (1) establishes that a warrant for the commitment of the putative father of a bastard child, under the bastardy law then in force (which in this respect was similar to the Act of 1872), until he should pay a sum due for the maintenance of the child and the legal accustomed fees, or until he should be otherwise delivered by due course of law, was bad, because under the statute the magistrate had no power to commit a putative father to prison for a longer period than three months. Mr. Laski, in support of the view that the plaintiff was a person charged with an "offence," relied on the judgment of Lord Alverstone C.J. in the case of *Rex* v. *Richardson*. (2) In that case it was held that although justices before making an order for maintenance in favour of a wife under the Summary Jurisdiction (Married Women) Act, 1895, ought to have evidence of the husband's means, if he fails to comply with that order they have jurisdiction to commit him to prison for such non-compliance notwithstanding that they had no evidence of his means at the date when the payment accrued due. In the course of his judgment the Chief Justice said (1): "The order committing the man to prison for non-payment is in the nature of a criminal conviction, the disobedience of the earlier order being treated as a contempt which may be purged by payment. That this is so seems clear from the language of s. 54 of the Summary Jurisdiction Act, 1879, which provides that 'This Act shall apply to the levying of sums adjudged to be paid by an order in any matter of bastardy, or by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums, in like manner as if an order in any such matter or so enforceable were a conviction on information.' That Act deals with two classes of proceedings, in one of which the proceedings are in their nature civil and are founded upon a complaint, and in the other of which the proceedings are criminal and are founded upon an information, and the section expressly says that the enforcement of a bastardy order shall belong to the latter class." I do not think the Chief Justice meant that the failure or neglect of the husband to comply with an order for the payment of alimony to his wife was a criminal offence. Non-compliance with an order for alimony made by the High Court is no crime, and it would be strange if non-compliance with a similar order made by justices were to be regarded as a criminal offence. I think that the Chief Justice only meant that proceedings for enforcement of an order made by justices were similar to proceedings in the case of offences which are triable summarily.

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(1) 1 Ex. D. 355.

(2) 2 B. & S. 363.

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(1) (1820) 3 B. & Ald. 493. (2) [1909] 2 K. B. 851; 25 Times L. R. 711.

But then it was said that if the defendant was not protected by the Criminal Justice Act, 1925, he could avail himself of the protection afforded by s. 6 of the Constables Protection Act of 1750 (24 Geo. 2, c. 44). That section provides that "no action shall be brought against any constable, headborough or other officer, or against any person or persons acting by his order and in his aid, for anything done in obedience to any warrant under the hand or seal of any justice of the peace," until demand hath been made of the warrant, and then if it be found that he has acted merely in obedience to the warrant, that then there may be an action against the magistrate if the warrant was invalid or unlawful, but no action should be maintainable against the constable. It is true that the warrant issued by Mr. Bryce commanded all the constables of Cheshire, and, therefore, constable Jones may be said to have been acting "in obedience to the warrant," when he arrested the plaintiff. But the constable in executing the warrant was bound to act in accordance with the law. He had no right to execute the warrant at any time, or in any place or in any manner forbidden by law. The view that was put forward by Mr. Hemmerde for the plaintiff is, I think, right. If the constable acts in obedience to the warrant, then, though the warrant be an unlawful warrant, he is protected by the statute of 1750, but if the warrant be a lawful warrant, and he executes it in an unlawful way, then no action is maintainable against the magistrate, but an action is maintainable against the constable. I think that proposition is established by the decision of Lord Mansfield in *Money* v. *Leach* (1) where he said: "Where the justice cannot be liable the officer is not within the protection of the Act." In *Price* v. *Messenger* (2) Lord Eldon, then holding the office of Chief Justice in the Court of Common Pleas, said (3): "The public interest requires that officers who really act in obedience to the warrant of a magistrate should be protected. In such cases, therefore, the law has provided that the remedy of the party grieved shall be confined to the magistrate, as well where he has granted a warrant without having jurisdiction, as where the warrant which he has granted is improper." And in that case the constables, having seized certain goods which were not included among the things they were directed to search for and seize, it was held that they had no defence to the claim of the person to whom the goods belonged for damages for wrongfully seizing his goods. And the case of *Atkins* v. *Kilby* (1) shows that constables so long as they act in obedience to the warrant cannot be made liable. That case also shows that where the warrant is in the form in which Mr. Bryce issued it here the officers effecting the arrest are not bound to take the money tendered to them by their prisoner, even though it be the full amount for which the warrant was issued.

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(1) [1909] 2 K. B. 856.

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(1) (1765) 3 Burr. 1742, 1768.
(2) (1800) 2 Bos. & P. 158.
(3) 2 Bos. & P. 161.

With regard to the claim for damages for unlawful imprisonment at the police station, it appears to me, although the warrant was invalid, that the defendant is entitled to the protection of the statute of 1750, for in detaining the plaintiff at the police station even after tender of the full amount due on the warrant the defendant was acting in obedience to the warrant. The language of the warrant is clear and precise; it ordered that the plaintiff should be arrested and should be brought before the court of summary jurisdiction at Dukinfield. In those circumstances it may be that the plaintiff can maintain an action against the magistrate, but he cannot in my opinion maintain any action against the defendant.

The result is that the plaintiff is entitled to the damages awarded in respect of his wrongful arrest by constable Jones, but is not entitled to the damages awarded in respect of his subsequent imprisonment at the police station. There must be judgment for the plaintiff for 175*l.* and costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Lancashire, Humphreys & Grundy, Manchester.*

Solicitors for defendant: *Barlow & Co., Stockport.*

(1) (1840) 11 Ad. & E. 777.

R. F. S.

GREENWOOD *v.* MARTINS BANK, LIMITED.

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July 21, 22, 29.

[1930. G. 713.]

Banker and Customer—Forged Cheque—Payment by Banker—Action to recover Money paid—Customer's Knowledge of Forgery—Non-disclosure —Husband and Wife—Loss of Remedy against Forger—Estoppel.

A husband and wife had a joint account with bankers who undertook to honour cheques signed by both customers. Afterwards that account was closed and an account was opened in the sole name of the husband, the wife having no authority to draw cheques upon it. During the currency of both accounts the wife repeatedly forged her husband's signature to cheques, and drew out money which she applied to her own uses. During the currency of the sole account the husband became aware of the forgeries, but being persuaded by his wife to say nothing about them, he kept silence for eight months. When he finally determined to disclose to the bank the forgeries, the wife committed suicide. In an action by the husband against the bankers to recover the sums paid out of the sole account on cheques to which his signature had been forged as aforesaid:—

Held, that the plaintiff owed a duty to the defendants to disclose the forgeries when he became aware of them and so enable the defendants to take steps towards recovering the money wrongfully paid on the forged cheques; that through his failure to fulfil this duty they were prevented from bringing an action against the plaintiff and his wife for the tort committed by the wife until after her death, when any action against the husband for the wife's tort abated; and therefore that the plaintiff was estopped from asserting that the signatures to the cheques were forgeries, and was not entitled to recover.

Appeal from the judgment of Mr. Commissioner du Parcq in an action tried at Manchester Assizes before the learned Commissioner without a jury.

The facts are stated in detail in the written judgment of Scrutton L.J. The following is a short summary.

Between March, 1926, and November, 1928, the plaintiff and his wife had a joint account with the defendants, to the amount of which the defendants were to honour cheques if drawn by both husband and wife. Thirty-two cheques on this account were honoured by the defendants. The wife signed her own name and forged the plaintiff's signature to eleven out of these thirty-two cheques. The last cheque on this account was paid on the sole signature of the wife.

In November, 1928, a new account was opened with the defendants in the sole name of the plaintiff. Of sixty-three cheques drawn on this account and honoured by the defendants the wife had forged the plaintiff's signature to forty-four. In paying these cheques the defendants' officials were guilty of negligence. In October, 1929, the plaintiff asked his wife to bring him a cheque, saying that he wanted to draw 20*l.* from his account with the defendants. She told him there was no balance to his credit in the account; that she had wanted the money to help her sister in legal proceedings relating to a house, and had drawn it out. He asked her who had forged his name, and she would not say who it was. She begged him on her knees not to inform the defendants of the forgeries until her sister's case was over; and partly out of consideration for his wife and partly in the hope of a favourable result of her sister's action, he said nothing to the defendants for eight months. There were no more forgeries after October, 1929. In June, 1930, he discovered that his wife had been deceiving him. On June 5 he told her he was going to the defendants. When he came home that evening, she shot herself.

On August 19, 1930, the plaintiff brought an action against the defendants claiming a declaration that he was entitled to 410*l.* 6*s.*, the amount of forty-four cheques which, as he alleged, had been wrongfully and without authority debited by the defendants to his account, and that he was entitled to be credited with that sum.

The learned Commissioner gave judgment for the plaintiff.

The defendants appealed.

Eastham K.C. and *Rice-Jones* for the appellants. The learned Commissioner has not given due weight to the conduct of the respondent. If he, knowing of his wife's forgeries, had gone to the appellants and said, "You ought to have seen that my signature to those forty-four cheques had been forged; but for sufficient reasons I am going to adopt the forgeries as my genuine signatures," could he after his wife's death have charged the appellants? The answer must be, No. By dissuading them from proceeding against the wife while she was alive he would have deprived the Bank of any remedy they might have had against the wife or against husband and wife jointly for the wife's tort, and would thereby have estopped himself from afterwards insisting that the signatures were forged, as a step towards charging the Bank with the amount of the cheques. The value of the right lost in no way affects the estoppel: *M'Kenzie* v. *British Linen Co.* (1); *Ogilvie* v. *West Australian Mortgage and Agency Corporation.* (2) What can be done by words can be done by conduct, for "Conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect": *Freeman* v. *Cooke* (3), per Parke B.; and see also *London Joint Stock Bank* v. *Macmillan* (4), per Lord Haldane. It is submitted as clear that the relation of banker and customer, which no doubt imposes on the banker the duty to know his customer's signature, imposes a reciprocal duty upon the customer: *Scholfield* v. *Earl of Londesborough* (5); *London Joint Stock Bank* v. *Macmillan.* (6) If the customer knows of a forgery to a cheque on his account, and still more if he knows of several forgeries, it is his duty to inform the banker, and not to lie by and say nothing until the banker has lost a remedy which would have been available if the customer had spoken sooner: *M'Kenzie* v. *British Linen Co.* (7), per Lord Watson. That was a case between the holders of a bill and one whose indorsement had to his knowledge been forged, but who had omitted to disclose that fact. In that case Lord Blackburn said (8): "I wish to guard against being supposed to say that if a document with an unauthorized signature was uttered under such circumstances of intent to defraud that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it so as to make a defence for the forger against a criminal charge. I do not think he could. But if the person whose name was without authority used chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible just as if he had originally authorized it"; and again (1): "His conduct and silence combined with his conduct may prove such a ratification." Referring to that and similar cases in *Ogilvie* v. *West Australian Mortgage and Agency Corporation* (2) Lord Watson, delivering the judgment of the Judicial Committee of the Privy Council, said: "The ground upon which the plea of estoppel rested in these cases was the fact that the customer, being in the exclusive knowledge of the forgery, withheld that knowledge from the bank until its chance of recovering from the forger had been materially prejudiced." In Paget's Law of Banking, 4th ed., p. 345, it is stated that "The banker cannot, of course, set up estoppel or adoption when the loss is attributable, even in part, to his own negligence; as where he has failed to detect an obvious forgery or alteration"; and reference is made to the American case of *Critten* v. *Chemical National Bank.* (3) But the case cited, so far from supporting the statement, appears to negative it. (4)

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(1) (1881) 6 App. Cas. 82, 100.
(2) [1896] A. C. 257, 270.
(3) (1848) 2 Ex. 654, 663.
(4) [1918] A. C. 777, 817, 818.
(5) [1896] A. C. 514.
(6) [1918] A. C. 777.
(7) (1881) 6 App. Cas. 82, 109.
(8) 6 App. Cas. 99.

Cyril Atkinson K.C. and *J. C. Jolly* for the respondent. The learned Commissioner rightly entered judgment for the plaintiff. It is the duty of a banker to know his customer's signature. The appellants were throughout guilty of great negligence with respect to these accounts, first with respect to the joint account, on which eleven cheques were paid though the signature of the respondent was in each case a palpable forgery, and which was finally cleared by a cheque which did not even purport to be signed by the respondent; and secondly with respect to the sole account of the respondent, cheques on which were paid upon signatures easily seen to be forgeries, and these cheques were paid notwithstanding the fact that the account was no longer in the wife's name, which ought to have suggested to the appellants that none but the genuine signature of the respondent was to

(1) 6 App. Cas. 100.
(2) [1896] A. C. 257, 268.
(3) (1902) 171 N. Y. Rep. 219.
(4) See 171 N. Y. Rep. 228, 229.

be relied on. The appellants are therefore prima facie liable. To exonerate themselves they rely on the conduct of the respondent. But a forgery cannot be ratified: *Brook* v. *Hook*. (1) In Beven on Negligence, 4th ed. (1928), vol. ii., p. 1505, it is said to be clear, both on principle and authority, that there can be no ratification of a forged instrument, for an essential element of ratification is wanting—namely, that the act ratified is one assumed or pretended to have been done for or under the authority of the party sought to be charged. If authority were wanted in support of this, there is the decision of the House of Lords in *Keighley, Maxsted & Co.* v. *Durant*. (2)

[GREER L.J. In Byles on Bills, 19th ed. (1931), p. 293, it is said that "A forgery is incapable of ratification, but if the drawee has once admitted that the acceptance is in his own handwriting, and thereby given currency to the bill, he cannot afterwards exonerate himself by showing that it was forged." (3) Why should not the same apply to a person whose signature is forged as that of the drawer of a cheque ?]

The law on this subject is summarized by Osler J.A. in *Merchants Bank* v. *Lucas*. (4) Assuming, without admitting, that a customer may in certain circumstances be estopped by his conduct from charging his banker with a loss occasioned through a forgery known to the customer but not communicated by him to the banker, the estoppel must depend upon the circumstances in each case. In *Davis* v. *Bank of England* (5) it was held that the plaintiff might recover from the bank dividends upon a sum of consolidated annuities, which was his property, but which the bank had transferred upon a forged power of attorney, though the plaintiff knew of the forgery and omitted to inform the bank of it until after the escape of the forger. Best C.J. delivering the judgment of the King's Bench held that as there was no suggestion that the plaintiff was implicated in the forgery, the mere concealment was not enough to prevent him from recovering. In

(1) (1871) L. R. 6 Ex. 89.

(2) [1901] A. C. 240.

(3) It may be doubted whether Lord Blackburn meant anything more than this in *M'Kenzie* v. *British Linen Co.* 6 App. Cas. 82, 99.

(4) (1889) 15 Ont. App. 573, 589.

(5) (1824) 2 Bing. 393.

cases like the present, where a loss has occurred through the negligence of two parties, that party should bear the loss whose conduct has really and in truth caused it. The real cause of this loss was the appellants' negligence, which placed the respondent in the dilemma of having to choose between the prosecution of his wife and the loss of his money. In other phases of the law it is well settled that the person whose negligence places another in a situation where he must accept one of two dangerous alternatives is responsible for injury resulting from the choice of either alternative.

Eastham K.C. in reply. In *Davis* v. *Bank of England* (1) Best C.J., after specifying certain cases where the non-disclosure by the plaintiff does not preclude him from recovering, expressly excepts the case where the plaintiff's silence has deprived the defendant of a remedy.

Cur. adv. vult.

July 29. The following written judgments were delivered :—

SCRUTTON L.J. In this case the learned Commissioner on the Northern Circuit has given judgment against Martins Bank, Ld., on a claim against them by one Greenwood for 410*l.*, being the amount of forty-four forged cheques which he alleged to have been wrongfully debited to his account. The Bank had contended that Greenwood's conduct had estopped him from alleging that the cheques were forgeries. The judge, however, held that the circumstances did not raise such an estoppel. The Bank appeals.

The facts are hardly in dispute. The husband and wife had in March, 1926, a joint account, cheques on which were to be signed by both. On that account we now know twenty-one cheques were drawn with genuine signatures; but to eleven cheques the wife forged her husband's signature. Some of these eleven signatures were very suspicious to anyone who looked at the genuine signature of the husband, which the Bank had. In November, 1928, this joint account was closed by a cheque signed by the wife alone, a most irregular proceeding. A new account was opened in November, 1928, in the husband's name alone. On this account the husband drew nineteen genuine cheques, but forty-four forged cheques were drawn by the wife. Again, some of the husband's forged signatures were very suspicious, and the Commissioner, after examining the cheques and hearing the evidence of the Bank officials, found that the forty-four signatures were not merely not genuine, but were honoured through carelessness of the Bank officials. The legal effect of this, for it has a legal effect supported by the highest authority, I deal with later.

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(1) 2 Bing. 393, 411.

In October, 1929, the husband, wanting to draw 20*l.* out of the account, asked the wife for his cheque book. I will read his evidence :—

" (Q.) Tell my Lord what passed between you and your wife. (A.) In October, 1929, I came home at dinner time and said to my wife : 'Well, Emma,'—that was my wife—I said, 'I could just do with 20*l.* out of my account. Would you mind fetching a cheque downstairs.' (The Commissioner.) Did you say which account ? (A.) My own account, private account. I used to call that the savings account. (Q.) Did you say which Bank ? (A.) Yes, Martins Bank. So she says : 'There is none in, Bert.' (Q.) You asked her to fetch a cheque down ? (A.) Yes, I asked her to fetch a cheque down, and of course she says there is no money in. I says : 'No money in the Bank.' I says : 'Why,' I says, 'where is it ?' 'Well,' she says, she had had it for their Olive—their Olive had had it to fight a case for a house ; and then of course I said : 'Well, who authorized you to get the money out of the Bank ?' I said : 'Who has forged my name to get it ?' And she would never tell who forged the name. Then of course I said : 'I am going to the Bank to see about it.' My wife pleaded hard with me. She said : 'Don't go to the Bank until this case is finished.' Well, of course there was a row between me and her, and she went down on her knees and wanted me not to go and this, that, and the other, until this action had been on. I naturally believed her. Of course I did not go to the Bank.

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(Q.) When you say you believed her, what did you believe? (A.) I believed there was a case. (Q.) And that you would get the money back? (A.) And that I would get the money back."

No signatures were forged after October, 1929, but the husband did not tell the Bank of the previous forgeries, partly not wishing to expose his wife, partly hoping that the money would come back as a result of the alleged action. On June 5 matters came to a climax.

[The Lord Justice read this further evidence:—]

"(Q.) Between October and June 5 were there conversations about going to the Bank between you and your wife? (A.) Yes; of course there were rows every time she wanted money to fight the case with; there was always rowing over the Bank, I was always telling her I was going to see. (Q.) You were always telling her you were going to see? (A.) I was always wanting to go to the Bank, and of course you have to ease a bit with your wife when she is your wife, have not you, to a certain extent? (Q.) Just before she shot herself, what brought things to a head? (A.) It was because I found out there was nothing; that she had been false and deceived me, and I said I was going right away to the Bank. When I came home at night she just sauntered down the stairs and said: 'Is that you?' I said: 'Yes.' She told me supper was on the table, and the next thing I heard was the shot, and of course I found her there." The husband then claimed on the Bank.

Counsel for the Bank argued: (1.) that the husband by his silence had ratified or adopted the forged cheques as his own; (2.) that he was estopped by his silence from alleging the signatures were forgeries. Disputing both allegations counsel for the plaintiff argued that the negligence of the Bank in carelessly honouring the signatures prevented any question of estoppel from arising. The argument starts with forged signatures which cannot authorize the Bank to honour the cheques, whether or not they could by reasonable care have detected the forgeries. I do not think "ratification" has any applicability to a forged signature. For ratification to be effective the act ratified must purport to be done by an agent for the person who ratifies : *Keighley, Maxsted & Co.* v. *Durant.* (1) It is true that Lord Blackburn in *M'Kenzie* v. *British Linen Co.* (2), a Scotch case, says that in civil cases a man may ratify a forgery, but in *Brook* v. *Hook* (3), the majority of the Court pointed out that a forgery which does not profess to be executed by a person as agent cannot be ratified by the alleged principal, and in my opinion this is the correct view of the law. A forgery can however be adopted. The supposed signer may say, "I will recognize this signature as my own ; you may debit my account with these cheques," and in that case the Bank which has acted on this statement could successfully object to the customer's endeavouring to withdraw his adoption.

I see no evidence in this case that the husband ever adopted these cheques as his own. He delayed in telling the Bank they were forged, but never said they were his. He never had a passbook for this account. This, however, is getting near to the defence of estoppel. Estoppel is a rule of evidence which prevents the person estopped from telling the truth, or from proving a state of things inconsistent with a previous statement or attitude of his own. The classic exposition of the principle of estoppel is that given by Parke B. in delivering the judgment of the Court in *Freeman* v. *Cooke.* (4) He cites the rule in *Pickard* v. *Sears* (5) : "That, where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter (6) his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." And continues, "The principle is stated more broadly by Lord Denman, in the case of *Gregg* v. *Wells* (7), where his Lordship says, that a party who negligently or culpably stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied, is not now the question; but the proposition contained in the rule itself, as above laid down in the case of *Pickard* v. *Sears* (1), must be considered as established. By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth;"—now comes the relevant passage—" and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect." I doubt whether the silence here amounts to a statement by conduct especially when made to a person who is ignorant of the facts, i.e., the forgeries, to which the statement might have relevance. But the passage concludes with a reference to conduct by negligence or omission where there is a duty to disclose the truth. This passage is cited with approval by Lord Haldane in *London Joint Stock Bank* v. *Macmillan.* (2)

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(1) [1901] A. C. 240.

(2) (1881) 6 App. Cas. 82, 99.

(3) (1871) L. R. 6 Ex. 89, 100.

(4) (1848) 2 Ex. 654, 663.

(5) (1837) 6 A. & E. 469, 474.

(6) "So as to alter" in 6 A. & E. 474.

(7) (1839) 10 A. & E. 90, 97.

Now *Macmillan's* case (3) has laid stress on the relations of banker and customer as giver and executor of a mandate, and the duties, which are I think mutual, to use reasonable care in the execution of the mandate. The customer is held bound to use reasonable care in drawing the cheque so that the banker may not be misled. But the relation does not merely refer to one cheque; it is a continuing relation in which the customer may draw cheques from time to time, and the banker is under a continuing duty to honour mandates.

(1) 6 A. & E. 469.
(2) [1918] A. C. 777, 817, 818.
(3) [1918] A. C. 777.

This, in my view, involves a continuing duty on either side to act with reasonable care to ensure the proper working of the account. It seems to me that the banker, if a cheque was presented to him which he rejected as forged, would be under a duty to report this to the customer to enable him to inquire into and protect himself against the circumstances of the forgery. This, I think, would involve a corresponding duty on the customer, if he became aware that forged cheques were being presented to his banker, to inform his banker in order that the banker might avoid loss in the future. If this is correct there was in the present case silence, a breach of a duty to disclose, which may give rise to an estoppel.

But then comes the point at which I think the Commissioner fell into error. It is not every breach of duty, or every carelessness, which will found an estoppel. Blackburn J., in *Swan* v. *North British Australasian Co.* (1), states the principle with great precision: "What I consider the fallacy of my brother Wilde's judgment is this: he lays down the rule in general terms 'that if one has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons to show that state of facts did not exist.' This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy; and these distinctions make in the present case all the difference." The same position is stated by Parke B. in giving the unanimous answer of the judges to the House of Lords in *Bank of Ireland* v. *Evans' Trustees* (2) (where the negligence

(1) (1863) 2 H. & C. 175, 182.

(2) (1855) 5 H. L. C. 389, 410.

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complained of was negligent keeping of the seal, a negligence similar to neglect in custody of the passbook), in these words: "The present case is entirely different. If there was negligence in the custody of the seal, it was very remotely connected with the act of transfer. The transfer was not the necessary or ordinary or likely result of that negligence. It never would have been, but for the occurrence of a very extraordinary event, that persons should be found either so dishonest or so careless as to testify on the face of the instrument that they had seen the seal duly affixed. It is quite impossible that the bankers could have maintained an action for the negligence of the trustees, and recovered the damages they had sustained by reason of their having made the transfer. If such negligence could disentitle the plaintiffs, to what extent is it to go? If a man should lose his cheque book, or neglect to lock the desk in which it is kept, and a servant or stranger should take it up, it is impossible in our opinion to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment. Would it be contended that if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal? It is clear, we think, that the negligence in the present case, if there be any, is much too remote to affect the transfer itself, and to cause the trustees to be parties to misleading the Bank in making the transfer on the forged power of attorney."

Now in the present case, applying these principles, if the Bank were simply relying on the respondent's silence as having induced them to honour the forged cheques, it is obvious that the silence of the customer was not "the proximate cause of leading the Bank into the mistake." All the cheques were forged and paid before the silence; no cheques were forged after the silence. The silence could not be the proximate cause of the Bank's mistake. What the Bank must rely on is that the silence or failure to disclose prevented the Bank from suing the forger, for when the truth was disclosed the forger was dead. The Bank has by the silence lost its opportunity of suing the forger and her husband. The position is a curious one. The husband would be liable for his wife's tort: *Edwards* v. *Porter*. (1) But the death of the wife even after action brought would cause the action to abate: *Capel* v. *Powell*. (2) Whether in view of the possibility of the wife's committing suicide, if disclosure took place, as in fact happened later, the Bank really lost a valuable asset may be doubtful.

In my view, the result is accurately stated by Lord Watson in *M'Kenzie* v. *British Linen Co.* (3) in these words: "The only reasonable rule which I can conceive to be applicable in such circumstances is that which is expressed in carefully chosen language by Lord Wensleydale in the case of *Freeman* v. *Cooke*. (4) It would be a most unreasonable thing to permit a man who knew the bank were relying upon his forged signature to a bill, to lie by and not to divulge the fact until he saw that the position of the bank was altered for the worse. But it appears to me that it would be equally contrary to justice to hold him responsible for the bill because he did not tell the bank of the forgery at once, if he did actually give the information, and if when he did so, the bank was in no worse position than it was at the time when it was first within his power to give the information." Apply this to the present case. The customer is not made liable by silence for the forged cheques, because the payment of the forged cheques preceded and was not caused by the silence. The customer would not be liable for his silence, if the Bank had not lost any right of action thereby. But if the silence of the customer has caused the Bank to lose its right of action, the customer is estopped from alleging the fact which he ought to have disclosed—namely, that the cheques were forged. If the claim of the Bank were for damages for failure to disclose, it might be that the improbabilities of recovering anything in the action might be taken into account; but the authorities show that in a question of estoppel, where the question is whether the customer is estopped from alleging that certain bills are forgeries, if the bank has lost something, the value of that something is not the measure of its claim, but, the customer being estopped from proving the bills forgeries, the bank gains by the amount of the bills. The customer here relies on two passages in Paget on Banking, 4th ed., pp. 330 and 345, to the effect that neither estoppel nor adoption can be relied on if the banker's negligence has in part contributed to the loss. He cites no English authority for this. The American authority is explained by the fact that the United States law has gone much further than the English as to the mutual duties of banker and customer. But in the present case while the carelessness of the Bank was a proximate cause of the Bank's loss in paying the forged cheques, it was not the proximate cause of the Bank's losing its right of action against the forger. This was caused by the failure of the husband to inform the Bank of the forgery till his wife was dead and the cause of action was lost.

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(1) [1925] A. C. 1.

(2) (1864) 17 C. B. (N. S.) 743, 748.

(3) 6 App. Cas. 82, 109.

(4) 2 Ex. 654.

The appeal must be allowed, the judgment for the plaintiff set aside and judgment entered for the defendants with costs here and below.

GREER L.J. This is the defendants' appeal against the judgment of Mr. du Parcq, K.C., Commissioner of Assize at Manchester, whereby he decided that the plaintiff was entitled to a declaration that the sum of 410*l*. 6*s*. had been wrongfully and without his authority debited by the defendants to his account, and that he was entitled to be credited by the defendants therewith. The said sum was made up of a number of debits that had been entered in the plaintiff's account with the defendants in respect of payments of various cheques to which the plaintiff's name had been forged as drawer by his wife. The defendant Bank admitted that the cheques were forged, but said that the plaintiff was disentitled to succeed in the action because: (1.) he had ratified the act of his wife in putting his name to the cheques, or (2.) he had adopted that act, or (3.) he was estopped by his negligence from alleging that the signature was not his.

The facts were peculiar. The forgeries were committed between November 15, 1928, and October, 1929. In October, 1929, the plaintiff, who was desirous of drawing some money from his account, asked his wife to bring him a cheque in order that he might sign the same. She told him there was no money in the Bank, as it had all been drawn out to pay moneys to her sister to enable her to fight a case about a house. She declined to say who had forged his name, but she persuaded him not to go to the Bank until her sister's case was finished. He consented not to do so for the time being in the expectation that as the result of the trial of the sister's case he might receive the amount of the forgeries, and would not therefore need to dispute the Bank's right to debit him with the amount. Nothing more happened for eight months, when he again raised the question in June, 1930. He seems to have come to the conclusion that his wife had probably not told him the truth about her sister's case, and therefore said he would go to the Bank. He told his wife he was going to do so. She thereupon shot herself. He informed the Bank, and, after ascertaining the position of his account, brought this action by writ dated August 19, 1930.

As it appears to me, the only question which it is necessary to determine is whether the learned Commissioner ought to have held that the plaintiff was estopped by his conduct from alleging that the signatures were not his and were unauthorized. It is well established by a number of cases that where one person makes a contract without intending or purporting to make it on behalf of another, the contract is incapable in law of being ratified: see *Kelner* v. *Baxter* (1); *In re Empress Engineering Co.* (2); *In re Northumberland Avenue Hotel Co.* (3) in the Court of Appeal. On these grounds it was decided in *Brook* v. *Hook* (4) that a forged signature to a joint and several promissory note was incapable of ratification. Notwithstanding the great authority of any opinion expressed by Lord Blackburn, I think it must be held that his dictum to the contrary effect in *M'Kenzie* v. *British Linen Co.* (5) cannot be regarded as authoritative.

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(1) (1866) L. R. 2 C. P. 174.
(2) (1880) 16 Ch. D. 125.
(3) (1886) 33 Ch. D. 16.
(4) L. R. 6 Ex. 89.
(5) 6 App. Cas. 82, 99.

Lord Blackburn's opinion is only a dictum, inasmuch as the House of Lords decided that no facts were proved which would amount to ratification if ratification were possible in law. As regards adoption, there was no evidence in the present case on which it could be held that the plaintiff had adopted the transaction in the sense that he had entered into a contract to be bound by his wife's unauthorized drawings. I have, however, come to the conclusion that the plea of estoppel ought to have prevailed. In the case of *M'Kenzie* v. *British Linen Co.* (1) the House of Lords decided that M'Kenzie's silence for a fortnight after he had discovered the forgery had not occasioned any detriment to the British Linen Company, and that they were not entitled to succeed on the ground of estoppel. Lord Blackburn uses these words (2): "I agree that though he did not ratify the act of Fraser, yet he may preclude himself, bar himself, by a personal exception from averring against the bank that the signature was not genuine. Lord Deas says 'that a duty lies upon a party whose name is forged not to do or say anything that may mislead a bank. It is his duty not to say anything that may so far deceive a bank as to enable a forger to escape from justice, and thereby, for anything that he can tell, prevent the bank from recovering from him full indemnity. He is not entitled to speculate upon the consequences that may ensue if the bank is prevented from going immediately against the forger. He is bound to take for granted that the result will be to prevent them from recovering on the bill which otherwise they would.' I agree that if he thus leads the bank to believe in the genuineness of the signature till it has lost some opportunity of recovering on the bill which if the bank had known of the forgery they might have used, it would be a sufficient alteration in the bank's position to preclude him as against the bank." Later on (3) he points out that if M'Kenzie had known of the second forgery his silence would certainly prejudice the bank, and would afford very strong evidence indeed that M'Kenzie thus

(1) 6 App. Cas. 82.
(2) 6 App. Cas. 100.
(3) 6 App. Cas. 101.

ratified Fraser's act for a time. I think in this passage Lord Blackburn is per incuriam suggesting that the true ground is ratification instead of estoppel. This appears from a later passage in the learned Lord's speech where he says (1): "Certainly I think that his not telling the bank on July 15 nor till July 29 that it was a forgery, and so letting them continue in the belief that it was genuine, if he had not induced it, could not so preclude him if, as I think was clearly the fact here, the bank neither gave fresh credit in the interval nor lost any remedy which if the information had been given earlier they might have made available." I infer from this that Lord Blackburn meant that if as a result of the silence of the man whose name had been forged the Bank lost a remedy which, if the information had been given to them, might have been available, this would be sufficient to establish a plea of estoppel. It seems to me that Lord Watson gives expression to the same opinion when he says (2): "The only reasonable rule which I can conceive to be applicable in such circumstances is that which is expressed in carefully chosen language by Lord Wensleydale in the case of *Freeman* v. *Cooke*. (3) It would be a most unreasonable thing to permit a man who knew the bank were relying upon his forged signature to a bill, to lie by and not to divulge the fact until he saw that the position of the bank was altered for the worse. But it appears to me that it would be equally contrary to justice to hold him responsible for the bill because he did not tell the bank of the forgery at once, if he did actually give the information, and if when he did so, the bank was in no worse position than it was at the time when it was first within his power to give the information."

In my judgment, in the present case the Bank was in a worse position when the plaintiff did inform them of the forgeries than it was when he first knew of the forgeries. They had allowed the debits to remain on their books as valid debts, whereas they might have taken steps against the plaintiff's wife, adding him as a defendant, and it is quite impossible to say with any degree of certainty that the taking

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(1) 6 App. Cas. 101.

(2) 6 App. Cas. 109.

(3) 2 Ex. 654.

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of those steps would have been of no value to the Bank. It does not necessarily follow that because eight months later Mrs. Greenwood committed suicide her mental condition would have been the same, and that its results would have been the same if the Bank had been informed eight months earlier than they were. I gather that the learned Commissioner would have given judgment for the defendants but for his acceptance of the statement contained in Paget on Banking, 4th ed., p. 345, which is in these words: "The banker cannot, of course, set up estoppel or adoption when the loss is attributable, even in part, to his own negligence; as where he has failed to detect an obvious forgery or alteration: cf. *Critten* v. *Chemical National Bank of New York*." (1) I fail to understand the logical cogency of this view, which has no English authority to support it. Whether the bank were or were not negligent in paying the cheques, they were in law disentitled to debit the plaintiff's account with the amount of the cheques. The effect of the estoppel is to preclude the plaintiff from setting up against the bank the fact that he had not signed the cheques. If the plaintiff had misled the Bank by saying in so many words "you need not worry about those cheques, the signatures are mine," there would be a clear estoppel, and it would not matter whether the cheques had or had not been negligently paid in the first instance. Estoppel by negligence is representation of fact by conduct, and if it is right to infer representation from conduct, it must have the same effect as representation by direct statement. In the case of *London Joint Stock Bank* v. *Macmillan* (2) Lord Haldane, in the course of his speech, treats the case as analogous to the case of a customer remaining silent when it is his duty to make a communication to his banker. I cannot myself conceive a stronger case for saying that there is a duty required of the customer by "the rules of fair dealing between man and man" (3) to inform the Bank of the existence of forged cheques when he knows that the Bank are relying on the validity of the forged cheques. This view of the case is supported by the advice given by Lord Watson to the Crown in *Ogilvie* v. *West Australian Mortgage and Agency Corporation* (1), to the effect that if a customer being in exclusive knowledge of the forgery withheld that knowledge from the bank until its chance of recovery from the forger had been materially prejudiced, the customer would be estopped from complaining of the payment of the forged cheques. The Privy Council, accepting that principle, only failed to apply it to the facts of the case because the customer had kept silence by the request of the accredited agent of the bank. It seems clear that otherwise they would have held that the customer was estopped.

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(1) 171 New York Rep. 219.

(2) [1918] A. C. 777, 818.

(3) Lord Watson, *Ogilvie* v. *West Australian Mortgage and Agency Corporation* [1896] A. C. 269.

In my judgment the plea of estoppel ought to have succeeded in this case. The appeal must be allowed, the judgment of the Commissioner reversed, and judgment entered for the defendants with costs.

Romer L.J. The facts of this case, so far at any rate as they are relevant to the decision of this appeal, are not in dispute. It is quite plain that, when the plaintiff was first made aware of the forgeries committed by his wife, he deliberately refrained from informing the Bank of what had taken place, in order to protect her from any action that the Bank might take. The plaintiff in cross-examination said that he knew that if he went to the Bank he would get his wife into difficulty, and that, with that knowledge in his mind, he never went near the Bank until his wife died. According to the evidence of the Branch Manager and the cashier, evidence that was accepted by the learned Commissioner, when the plaintiff did at last go to the Bank, he told them that he did not want any bother, that he did not want to give his wife away, and that that was the reason why he had held his hand. The plaintiff, in other words, intended the Bank to believe that the signatures to the cheques were his. The Bank continued so to believe until after the death of the wife, with the result that they lost the opportunity which otherwise they would have had of taking proceedings

(1) [1896] A. C. 257, 268.

against the wife and the plaintiff as her husband for the recovery of the money that she had wrongfully extracted from the Bank. In so acting the plaintiff was, in my judgment and for the reasons that have been given by Scrutton L.J., committing a breach of the duty that he owed to the Bank.

In these circumstances it would seem to be in accordance with the established principles of estoppel that the plaintiff should not be allowed to allege as against the Bank in this action that the signatures to the cheques are not his: *M'Kenzie* v. *British Linen Co.* (1); *Ogilvie* v. *West Australian Mortgage and Agency Corporation.* (2) This is in accordance with what the learned Commissioner would himself have decided, had he not come to the conclusion that the Bank had been guilty of negligence in not having themselves detected the forgeries at an earlier date. But, having arrived at that conclusion, he held that the Bank was thereby prevented from relying upon the estoppel, and accordingly gave judgment for the plaintiff. The argument on behalf of the plaintiff that was accepted by the learned Commissioner seems to have been as follows: "The Bank cannot rely upon estoppel by negligence unless that negligence of which they complain was the proximate cause of the loss that they have suffered, whereas in truth and in fact the proximate cause of the Bank's loss was the negligence of the Bank." The fallacy that seems to me to lie at the root of this argument is that the loss referred to where that word is first used is not the loss referred to where the word is used for the second time. The loss that the Bank suffered by reason of the plaintiff's conduct was the loss of their opportunity of taking proceedings for recovery of the money extracted from them by the plaintiff's wife. The loss that was due to their own negligence was the loss of the money in the first instance. Had the Bank taken civil proceedings in respect of the wife's tort, the negligence on their part in cashing the cheques would not have been an answer. Why, then, should they be debarred by that negligence from

(1) 6 App. Cas. 82.

(2) [1896] A. C. 257.

complaining of the loss of that remedy? The plaintiff's argument, when analysed, comes to this: "It is true that by my conduct I led you to believe that the signatures to the cheques were mine. But had you taken reasonable care, you would have known that the signatures were forgeries, and you would not have acted to your detriment as in fact you did in reliance upon the belief that I induced." It is, however, well settled that it is no answer to a person who has in fact been misled by an untrue representation to say that he had the means of ascertaining the truth for himself, and did not avail himself of those means.

In the present case it is, of course, obvious that if the Bank had not been guilty of the negligence attributed to them by the learned Commissioner, the cheques, or some of them, would never have been cashed at all, and the occasion for the plaintiff's conduct that is complained of would never have arisen. But the cheques having in fact been cashed, and the Bank's remedy having in fact arisen, I cannot see why the Bank's negligence should deprive them of their right to complain of the conduct on the plaintiff's part which resulted, in fact, in the remedy being lost.

For these reasons the appeal should in my judgment be allowed with costs here and below.

Appeal allowed.

Solicitors for appellants: *Haslewood, Hare & Co., for R. Kidd Whitaker, Accrington.*

Solicitors for respondent: *Indermaur & Brown, for Woosnam & Callis, Blackpool.*

W. H. G.

NOTE.—It is assumed without question throughout this case that an action for fraud or deceit will lie against a forger at the suit of a person directly affected by the forgery, on the ground that it is a false and fraudulent representation that a certain writing is the signature of a particular person. If the forgery should amount to a felony, there might be a difficulty in suing before prosecution of the felon; but otherwise there seems to be no reason why an action should not lie. "If a notary or other person of covin counterfeit the seal of any parson or vicar, and forge letters of resignation of his parsonage or vicarage, in the name of the parson or vicar of his benefice, he shall thereupon have a writ of deceit, and the writ is in the Register." Fitzherbert, Natura Brevium, p. 99, Writ of Deceit, pl. K; Registrum Omnium Brevium, De Deceptione, f. 116.—W. H. G.

K. B. D.
1931
June 17.

C. A.
Oct. 21.

WARD *v.* BRITISH OAK INSURANCE COMPANY, LIMITED.

[1931. W. 887.]

Insurance—Third Party Risks—Insured Company—Liquidation—Liability incurred before Passing of Act—Act not Retrospective—Third Parties (Rights against Insurers) Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 25), *s.* 1.

The Third Parties (Rights against Insurers) Act, 1930 (20 & 21 Geo. 5, c. 25), s. 1, sub-s. 1, provides: "Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then (*a*) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or (*b*) in the case of the insured being a company, in the event of a winding-up order being made, or a resolution for a voluntary winding-up being passed, with respect to the company . . . . if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred":—

Held, that this section was not retrospective so as to affect cases in which the liability had been incurred before July 10, 1930, when the Act came into operation.

ACTION tried by Charles J. without a jury.

On November 17, 1927, the plaintiff was injured by a motor lorry owned by James & Clark, Ld., and driven by their servant, one George Bowd. On February 22, 1928, he issued a writ in the High Court claiming damages for negligence against James & Clark, Ld. (hereinafter referred to as "the company"), and Bowd. This action was remitted to the County Court of Middlesex holden at Edmonton, and on March 21, 1929, as a result of the trial, judgment was entered for the plaintiff in that Court for 100*l.* and costs.

The company was at all material times insured with the defendants against liability to pay compensation for bodily injury caused by their vehicles to third persons. On December 27, 1927, a resolution was passed for the voluntary winding-up of the company, and a liquidator was appointed. The liquidation was completed, but the liquidator took no steps to obtain payment from the defendants under the policy of insurance. On March 5, 1931, the plaintiff, suing as a poor person, brought an action to recover 154*l.* in all, the amount of the judgment and costs, from the defendants under the policy by virtue of the Third Parties (Rights Against Insurers) Act, 1930.

Percy Lamb for the plaintiff. It is not necessary to show that the statute is retrospective in its operation; for the plaintiff's rights were in being when it was passed. Here, however, the statute was retrospective, because it was passed to remedy an existing evil and to create a new right. In such cases there is a right to the new remedy, even without express words in the statute, and the statute becomes retrospective in its operation: *Lane* v. *Lane* (1), following *Reg.* v. *Birwistle.* (2) This has been held to be the case in various Acts, for instance, in the Married Women (Maintenance in Case of Desertion) Act, 1886, there were no express words making the Act retrospective, and yet it was so held in *Reg.* v. *Birwistle* (2), Lord Coleridge C.J. observing in argument: "Scores of Acts are retrospective, and may without express words be taken to be retrospective, since they are passed to supply a cure to an existing evil." It was held in *In re Lees* (3) that the Solicitors Act, 1843, even without express words, was retrospective, as to bills previously taxable, and this case was followed in *In re Eyre.* (4)

Ernest Hancock for the defendants. The Act of 1930 was intended to remedy the position which existed before the Act, and which was illustrated in *In re Harrington Motor Co.; Ex parte Chaplin.* (5) Before 1930 the bankruptcy of the assured might deprive the judgment creditor of his rights to the insurance money, which then went to the trustee for the general body of creditors. The transfer of rights to the plaintiff under s. 1, sub-s. 1, of the Act of 1930, takes place on the incurring of the liability or at the commencement of the winding-up, whichever is later in time. The Act applies

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(1) [1896] P. 133.
(2) (1889) 58 L. J. (M. C.) 158.
(3) (1844) 5 Beav. 410.
(4) (1848) 2 Ph. 367.
(5) [1928] Ch. 105.

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only where either the accident or the winding-up took place after July 10, 1930, when it came into force. The other statutes, cited as being retrospective, did not interfere with existing rights, and the Solicitors Act, 1843, only affected procedure. The words in the present statute raise a presumption that the Act was not intended to be retrospective. Very clear words are required in an Act of Parliament to revive or recreate an expired right: *Lauri* v. *Renad* (1), per Lindley L.J., referred to by Maugham J. in *Gardner & Co.* v. *Cone.* (2)

CHARLES J. [after stating the above facts, continued :] In these circumstances the plaintiff sues in reliance upon the Third Parties (Rights Against Insurers) Act, 1930, s. 1, sub-s. 1 (*b*). [His Lordship read the section and continued :] For the defendants it is said that the section cannot be applied here unless the Act is held to be retrospective, and in my view that contention is right. The point is interesting and without authority. I am guided by a general consideration of the law applicable to retrospection. That law has been frequently dealt with and the general principle was laid down by Lindley L.J. in *Lauri* v. *Renad* (3), in a judgment in which Bowen L.J. concurred, as follows: "It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary." That statement of the law has been repeated in other cases, and was relied upon by Maugham J. in *Gardner & Co.* v. *Cone* (4), who elaborates it thus: "An Act may be called retrospective because it affects existing contracts as from the date of its coming into operation; and this section is an instance of that. It may be more properly described as retrospective, because it applies to actual transactions which

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(1) [1892] 3 Ch. 402, 420, 421.

(2) [1928] Ch. 955, 967.

(3) [1892] 3 Ch. 402, 421.

(4) [1928] Ch. 955, 966.

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have been completed, or to rights and remedies which have already accrued." It is said that in other Acts, such as the Solicitors Act, 1843, words which were not clearly retrospective were so held, although the Act created a new remedy and affected existing rights: *In re Lees* (1) and *In re Eyre*. (2) But when those Acts are examined one finds words which really connote retrospection. The question here is whether the words of this Act, without being strained, can be said to connote retrospection, or whether the Act is only prospective. Sect. 1 refers to a person insured against liabilities "which he may incur." It does not say liabilities "which he has incurred," as would be said if retrospection were intended. Again, if the insured is a company then "in the event of a winding-up order being made" certain results follow: the statute does not say "in the event of a winding-up order having been made." Again, "if . . . . any such liability . . . . is incurred by the insured, his rights . . . . shall . . . . be transferred to and vest in the third party": the section does not say, "If any liability *has been* incurred, his rights shall be deemed to be transferred," or similar words importing retrospection. I can find nothing in this section to indicate that it is retrospective in its operation, and I think that the plaintiff cannot succeed unless the Act is held to be retrospective. Before this Act was passed, upon the authority of *In re Harrington Motor Co.* (3), the insurance money would form part of the assets of the company and be used for distribution among the general body of creditors. If the liquidator so desired it would seem that he could claim an indemnity from the defendants for money paid as damages to the plaintiff. But as he has not done so, there is no liability on the defendants, and I must give judgment in their favour.

Judgment for defendants.

F. P. F

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(1) 5 Beav. 410.

(2) 2 Ph. 367.

(3) [1928] Ch. 105.

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The plaintiff appealed. The appeal was heard on October 21, 1931.

Doughty K.C. and *Percy Lamb* for the appellant.

Ernest Hancock for the respondents was not called upon.

SCRUTTON L.J. On November 17, 1927, the plaintiff was injured through the negligence of one George Bowd in driving a motor lorry belonging to a company named James & Clark, Ld. That company was insured with the respondents against liability to pay compensation for bodily injury caused by the assureds' servants to third persons. Thus at the date of the accident the appellant could have sued the company, and the company would have been entitled to recover from the respondents the amount for which the appellant had recovered judgment.

On December 29, 1927, a resolution for the voluntary winding-up of James & Clark, Ld., was passed and a liquidator was appointed. At that time questions had arisen about the legal position when tort feasors became bankrupt or went into liquidation while money was due to them from insurers who had secured them against claims in respect of their torts. It had been established by various shipping cases that the money due from the insurers went to the creditors of the tort feasor and was not appropriated or earmarked for the special benefit of the person injured by the tort, because there was no privity between the liquidator and the person injured, except as one of the creditors. *In re Harrington Motor Co. Ex parte Chaplin* (1) was decided on this principle. This was thought to be an unsatisfactory state of things, and the Act of 1930 was passed in order to remedy it and to provide that when the tort feasors were insured against liabilities to third parties, sums due to them from their insurers should on their bankruptcy or liquidation no longer go to their general creditors, but should be transferred to the injured person. The question is whether the Act applies where the injury happened before the Act was passed, because

(1) [1928] Ch. 105.

unless the Act has a certain retrospective effect, the policy money would in due course go to the tort feasor or his creditors and not to the injured person. The words of the Act are " where . . . . a person . . . . is insured against liabilities to third parties " . . . . The Act was passed on July 10, 1930. On that day James & Clark, Ld., were so insured by a contract of insurance dated November 10, 1927. When Parliament said " is insured," did it mean " is now or hereafter may be insured " ? The liabilities which the Act contemplates are " liabilities which he may incur." Did Parliament mean by those words, " liabilities which he may henceforward incur or may have incurred already " ? Then " in the case of the insured being a company, in the event of a . . . . resolution for a voluntary winding-up being passed, with respect to the company . . . . if, either before or after that event, any such liability as aforesaid is incurred by the insured." Does that mean incurred not only before or after the winding-up, but before or after the passing of the Act ? Under these conditions " his rights against the insurer under the contract " of insurance " in respect of the liability shall, ... be transferred to and vest in the third party to whom the liability was so incurred." Without reference to decided cases I should think that those words referred to liabilities incurred to third parties after, but not to liabilities incurred before, the passing of the Act. Prima facie an Act deals with future and not with past events. If this were not so the Act might annul rights already acquired, while the presumption is against that intention. A good instance of the application of this principle is *Beadling* v. *Goll.* (1) There actions had been brought to recover from a bookmaker the amount of lost bets which had been paid by cheques. The actions were brought in reliance on s. 2 of the Gaming Act, 1835. After the writs had been issued the Gaming Act, 1922, was passed, which after repealing s. 2 of the Act of 1835, went on to provide that " no action for the recovery of money under the said section shall be entertained in any Court." After the passing of that Act the case came on for hearing before my brother Greer J. The

(1) (1922) 39 Times L. R. 128.

Scrutton L.J.

plaintiff contended that the sum claimed was recoverable under the express words of the Act. The defendant argued that the Act did not refer to matters occurring before it was passed. Greer J. felt himself precluded by the Act of 1922 from giving judgment in favour of the plaintiff. The Court of Appeal took a different view and, applying the presumption that an Act of Parliament does not affect proceedings commenced before the Act was passed, held that the money claimed could be recovered. Both on the wording of the Act of 1930 and by the effect of the presumption I am led to the conclusion that the Act applies to liabilities incurred towards third parties and rights acquired by them after and not to rights or liabilities acquired or incurred before the passing of the Act. Therefore this appeal must be dismissed.

GREER L.J. I am of the same opinion. The question in the appeal is the right construction of the Third Parties (Rights Against Insurers) Act, 1930, s. 1, sub-s. 1, and its application to admitted facts. On February 22, 1928, the plaintiff issued his writ, and on March 21, 1929, he recovered judgment for 100*l.* and costs. At that date the creditors of James & Clark, Ld., had a vested right to have the assets of that company realized and distributed among them after the costs of the liquidation had been paid. One of the assets of the company was the liability of the respondents to pay the amount of the insurance. That was an asset divisible among the creditors, notwithstanding that the amount which it might provide for any particular creditor might be small. On July 10, 1930, the Act was passed. It is clear from the dates that if that Act transferred to the appellant the right to recover from the respondents it could only do so by depriving the creditors of James & Clark, Ld., of a right which had already accrued to them. There are numerous cases which clearly show that the Courts lean against so interpreting an Act as to deprive a party of an accrued right. In my opinion there is nothing in this Act which interferes with accrued rights. The question is not without difficulty. It might be said that the language of the Act is applicable to any contract of insurance indemnifying against claims made after the date of the policy of insurance; but it is equally possible to say that the words apply only to claims made after the date of the Act. Sect. 1, sub-s. 1 (*b*), seems to me to confirm the latter interpretation. That sub-section provides that "in case of the insured being a company, in the event of . . . . a resolution for a voluntary winding-up being passed, with respect to the company, ... if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer . . . . shall . . . . be transferred" . . . . Those words are more appropriate to liabilities incurred by insured persons and claims accruing against their insurers after the passing of the Act; if liabilities incurred before the Act were meant to be included, the words would naturally have been "if . . . . any such liability has been or may hereafter be incurred." In view of the presumption against a construction which will divest accrued rights I think the wording of the sub-section points to liability incurred after the passing of the Act by the person insured, and that the appeal should be dismissed.

SLESSER L.J. I agree. The mischief to be remedied by the statute appears clearly in *In re Harrington Motor Co.* (1) In that case it was held that the injured person was not entitled to receive in full the benefit of the insurance by which the wrongdoer had indemnified himself against the consequences of the act or neglect through which the injured person had suffered. Before the Act was passed there was no "privity under which," as Lord Hanworth M.R. says (2), "when the bankruptcy or liquidation supervenes, you can cancel out the defendants"—in this case James & Clark, Ld. —"and then say that a privity arises between the creditor and the insurance company and that the latter has to make good this principal sum to the former." In the event of the bankruptcy or liquidation of the party insured the Act transfers the benefit of the insurance from the creditors of the party insured to the person injured, and deprives the liquidator and the creditors of a right to which but for the Act they would be entitled. The Act should, therefore, be construed as one which was not intended to affect rights already vested. The language of s. 1, sub-s. 1, is ambiguous and is certainly not such as to show clearly an intention to divest a right already acquired. The section speaks of "liabilities . . . . which he"—the insured person—"may incur." It would have been easy to add "or may have incurred," if the Legislature had intended to include liabilities incurred before the passing of the Act; but those words do not appear. In contrast with this is the language with reference to bankruptcy or liquidation of the party insured: "if, either before or after that event" the insured incurs any such liability, his rights against the insurer are transferred. Moreover the words "is insured" point to contracts of insurance in existence at the passing of the Act giving rise to claims after the Act has been passed. In my opinion the wording is not clear enough to escape from the rule that vested interests are not intended to be interfered with by legislation, except when that intention is expressed in clear words.

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(1) [1928] Ch. 105.

(2) [1928] Ch. 113.

Appeal dismissed.

Solicitors for appellant: *Dennes, Lamb & Drysdale.*
Solicitors for respondents: *Munton, Morris, King & Co.*

W. H. G.

ELLERBECK COLLIERIES, LIMITED *v.* CORNHILL INSURANCE COMPANY, LIMITED.

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Nov. 9.

[1930. E. 572.]

Workmen's Compensation—Industrial Disease—Certificate of Certifying Surgeon—Date of Disablement—Liability of Employer—Insurance—Indemnity—"Shall sustain any personal injury or disease . . . . while engaged in the service of the employer"—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 43.

By a provisional insurance which was operative between March 8 and March 18, 1929, an insurance company agreed to indemnify a colliery company against claims by the colliery company's workmen under the Workmen's Compensation Act. The provisional insurance was subject to the terms of the insurance company's policy of insurance, by the terms of which the insurance company agreed to indemnify the assured if, at any time during the currency of the insurance, "any employee in the employer's immediate service shall sustain any personal injury by accident or disease . . . . while engaged in the service of the employer, in work forming part of or process in the [employer's] business . . . . and in case the employer shall be liable to make compensation for such injury." The form of policy contained a condition that the premium was to be regulated by the amount of wages paid to the employees, and the name of every employee and the amount of his wages were to be truly recorded in a proper wages book.

During the currency of the provisional insurance two of the colliery company's workmen were certified by the Certifying Surgeon to be suffering from miners' nystagmus, the disablement in the one case being stated as having commenced on March 11, and the other on March 12, 1929. On appeal, the Medical Referee agreed with the Certifying Surgeon, but added that each workman was suffering from nystagmus before January 1, 1929. The two workmen were not actually at work on March 11 and 12, one having been off work for some time owing to influenza, and the other because the seam in which he had been working was temporarily blocked by a fall of earth, but the names of both appeared in the pay sheet but with no wages opposite their names, as no wages were in fact paid to them.

The colliery company, having had to pay compensation to the two workmen, claimed to be indemnified by the insurance company:—

Held, (1.) that the date of each of the workmen's disablement, within the meaning of s. 43 of the Workmen's Compensation Act, 1925, was the date stated in the Certifying Surgeon's certificate—namely, March 11 and 12, 1929, and therefore was within the period covered by the provisional insurance; (2.) that, although neither workman was receiving wages at the time of his disablement, he was in the employment of the colliery company; and (3.) that the colliery company was therefore entitled to the indemnity claimed.

Per Scrutton L.J.: As the Medical Referee did not reverse the certificate of the Certifying Surgeon, he had no jurisdiction to state that the workmen were suffering from nystagmus before January 1, 1929.

Per Scrutton L.J.: The views expressed by the Privy Council in *Victoria Insurance Co.* v. *Junction North Broken Hill Mine* [1925] A. C. 354 as to the date of the accident are inconsistent with those expressed by the House of Lords in *Blatchford* v. *Staddon & Founds* [1927] A. C. 461.

Decision of Humphreys J. affirmed.

APPEAL from a decision of Humphreys J.

The plaintiffs, who were colliery owners, claimed to be indemnified by the defendants in respect of payments of compensation made to two of the plaintiffs' workmen under the Workmen's Compensation Acts.

By a memorandum of provisional insurance dated March 8, 1929, the defendants agreed to indemnify the plaintiffs for three months from March 8 against any personal injury by accident or disease coming within the provisions of the Workmen's Compensation Acts, "subject to satisfactory report by Mining Engineer of the Cornhill Insurance Company, Ld." The report of the Mining Engineer not being satisfactory, the cover ceased on March 19, 1929. The cover note covered non-fatal accidents only, and provided that "this insurance is otherwise subject to the terms and conditions of the Cornhill Insurance Company's policy." The form of policy to which the cover note referred provided that "if at any time during the said period any employee in the employer's immediate service shall sustain any personal injury by accident or disease .... while engaged in the service of the employer, in work forming part of or process in the business above mentioned, and in case the employer shall be liable to make compensation for such injury .... the company shall indemnify the employer against all sums for which the employer shall be so liable . . . ." Certain conditions were printed on the form of policy; among these being clause 3, which was in these terms: "The premium is to be regulated by the amount of wages, salaries and other earnings or allowances paid to the employees by the employer during the above-mentioned period. The name of every employee, and the amount of wages, salaries and other earnings or allowances paid to him, shall be truly recorded in a proper wages book, which shall at all times be open to inspection by the company, and the employer shall supply the company with a correct account of all such wages, salaries or other earnings or allowances paid during the said period within one month from the expiry hereof. If the total amount so paid shall differ from the amount on which the premium has been paid, the difference in premium shall be met by a further proportionate payment to the company, or by a refund by the company, as the case may be."

During the currency of the cover note, two men, named Boardman and Jolly, who had been in the plaintiffs' service for many years, were certified by the Certifying Surgeon to be suffering from miners' nystagmus, one being so certified as suffering from that disease on March 11, and the other on March 12, 1929. On appeal, the Medical Referee agreed that the two men were suffering from nystagmus on the dates mentioned, and he added that each of them had suffered from that disease before January 1, 1929. The two men were not actually working on March 11 and 12, one having been off work through influenza and the other being off work owing to the seam in which he had been working being temporarily blocked by a fall of earth. The names of these men, however, appeared on the plaintiffs' pay sheet each week, but with no wages opposite their names, as no wages were paid. The plaintiffs' manager said "their employment was not terminated."

In proceedings by the two workmen under the Workmen's Compensation Acts, the plaintiffs were ordered to pay to each of them compensation, and it was in respect of this that the plaintiffs now claimed indemnity.

By their defence the defendants said that the two workmen did not sustain the disease during the currency of the cover note, and, further, that neither was an employee of the plaintiffs during the currency of the cover note.

Humphreys J. held that the plaintiffs were entitled to the indemnity claimed, and gave judgment for them accordingly.

The defendants appealed. The appeal was heard on October 29, 30, 1931.

Cave K.C. and *W. Gorman* for the appellants. Humphreys J. has held that the appellants are liable to indemnify the respondents because the two workmen—Boardman and Jolly—were "disabled" during the currency of the cover note. That is not the event the occurrence of which determines the respondents' right to be indemnified. However important it may be as between the respondents and their employees, it is immaterial as between the appellants and the respondents. As between the latter the material question is when the workmen sustained the injury complained of. Sect. 43 of the Workmen's Compensation Act, 1925 (1), makes disablement from an industrial disease equivalent to the happening of an accident, but it does not make the date of disablement the date of the accident. If it did, a man who was disabled while out of work could not get compensation: *Victoria Insurance Co.* v. *Junction North Broken Hill Mine.* (2) In that case Lord Wrenbury, in delivering the judgment of the Privy Council, said (3): that "the disablement . . . . establishes the happening of the accident, but not the date at which it happened." The date when the disease is contracted is the date of the accident, and in this case it is clear from the Medical Referee's certificate that the disease was contracted before the cover note came into existence. *Blatchford* v. *Staddon & Founds* (4), and *M'Dougall* v. *Summerlee Iron*

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(1) Workmen's Compensation Act, 1925, s. 43, sub-s. 1: "Where (1.) the certifying surgeon . . . . certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act [this includes miners' nystagmus], and is thereby disabled from earning full wages at the work at which he was employed . . . . and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement, ... he . . . . shall be entitled to compensation under this Act as if the disease . . . . were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications: (*a*) the disablement . . . . shall be treated as the happening of the accident. . . . ."

Sub-s. 2: "For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given. . . . ."

(2) [1925] A. C. 354.

(3) Ibid. 357.

(4) [1927] A. C. 461.

Co. (1) are said to be in conflict with *Victoria Insurance Co.* v. *Junction North Broken Hill Mine* (2), but the latter case is directly in point, which cannot be said in reference to the cases cited in opposition to it. The same comment may be made on *Wilsons and Clyde Coal Co.* v. *Flynn.* (3)

Secondly, as by the conditions annexed to the form of policy it is provided that the premium is to be regulated by the amount of wages paid to the employees by the employer during the currency of the cover note, and as no wages were paid to the workmen in question during that period, it follows that the respondents were not covered in respect of the two workmen.

Eastham K.C., *J. Lustgarten* and *J. L. Henry* for the respondents. Sect. 43 of the Workmen's Compensation Act, 1925, creates what was called by the Lord Justice-Clerk in *Russell* (*Archibald*), *Ld.* v. *Keary* (4)—in speaking of the corresponding section in the Act of 1906—" a fictitious form of accident," and the date of that fictitious accident is the date of disablement. In *Blatchford* v. *Staddon & Founds* (5) Lord Wrenbury said (6): "It [the Act] says that the disease . . . . is to be considered as the personal injury by accident. Does this mean that the contraction of the disease is the accident, or does it mean that the ascertainment in a defined way of the fact of the disease having been contracted is the accident? On the whole from that which I have to say further, I think it must mean the latter," a view not consistent with that expressed by the same noble Lord in *Victoria Insurance Co.* v. *Junction North Broken Hill Mine.* (2) The date of disablement in each case was within the period covered by the insurance.

On the second point: Both workmen were in the service of the respondents in work forming part of the business of coal mining at the date of their disablement, although it is true that neither was actually working on that date.

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(1) 1927 S. C. (H. L.) 72; 20 B. W. C. C. 419.

(2) [1925] A. C. 354.

(3) [1930] A. C. 516.

(4) (1915) 8 B. W. C. C. 410, 412.

(5) [1927] A. C. 461.

(6) [1927] A. C. 478.

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Cave K.C. in reply. The appellants' liability, if any, turns on the terms of the policy, not on the terms of s. 43 of the Act of 1925. If the policy covers a case of this kind, the insurance company obtains no protection from the clause as to payment of wages and entry of names in respect of men not actually working and earning wages. As to s. 43, there is no ground for saying that the decision in *Victoria Insurance Co.* v. *Junction North Broken Hill Mine* (1) is inconsistent with later cases.

Cur. adv. vult.

Nov. 9. The following judgments were read:—

SCRUTTON L.J. This appeal raises some curious points arising from the elaborate fictions which Parliament has included in the legislation by which it has dealt with industrial diseases in an Act primarily providing for compensation to workmen for "accidents" arising out of and in the course of their employments. By reason of these fictions the Ellerbeck Collieries have become liable to pay compensation to two workmen for "accidents" happening between March 9 and 18, 1929. The colliery company claims indemnity against these payments from the Cornhill Insurance Company under a policy of insurance or provisional cover note covering the colliery company between March 9 and 18, 1929. The Insurance Company reply that nothing happened between March 9 and 18 which under the terms of their policy required them to indemnify the colliery company. Humphreys J. has decided in favour of the colliery company, and the Insurance Company appeal.

The facts from the colliery company's point of view are that at the beginning of 1929 two workmen, Boardman and Jolly, had been in their employment as piece-work miners for many years. On January 16, 1929, Jolly got influenza and was unable to work for some time. On February 22, 1929, the seam of the mine in which Boardman worked was temporarily blocked by a fall of earth and he could not work. From these dates up to March 18 the names of the two men appeared on the colliery company's pay sheet each week, but with no wages opposite their names as no wages were paid. The colliery manager says "their employment was not terminated."

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(1) [1925] A. C. 354.

The colliery company had been insured in another insurance company up to March 9, 1929, for fatal accidents only, with a temporary cover for non-fatal accidents. But on March 5 the colliery company made a proposal to the Cornhill Insurance Company for indemnity against non-fatal accidents only, for a period of three months. They answered a number of questions, including one as to "the number of nystagmus claims certified during the last twelve months." The question as to "certification" shows that the insurance company were well aware of the relevance and importance of certification of nystagmus. On March 8 the insurance company issued a cover note, subject to the terms and conditions of the insurance company's policy, for three months from March 8, 1929, "subject to satisfactory report by Mining Engineer." The report was not satisfactory, and the cover ceased on March 19, 1929.

During the period between March 8 and 19 Boardman and Jolly each went to the Certifying Surgeon alleging that each of them was suffering from nystagmus. On March 12 the surgeon certified that Boardman was suffering from miners' nystagmus and that the disablement commenced on March 12, 1929. On appeal the Medical Referee agreed that Boardman was so suffering on March 12, 1929, and added that he suffered from nystagmus before January 1, 1929.

On March 13, 1929, the surgeon certified that Jolly was suffering from nystagmus on that day, and that the disablement commenced on March 11, 1929. The Medical Referee on appeal agreed that Jolly was suffering from nystagmus on March 13, and added that he suffered from nystagmus before January 1, 1929. As the Medical Referee did not reverse the certificate of the Certifying Surgeon, he had in my opinion no jurisdiction to insert the remark about the earlier attack of nystagmus.

On these certificates the workmen claimed compensation from the colliery company under s. 43 of the Workmen's Compensation Act, 1925, which provides (inter alia) that the disablement by an industrial disease shall be treated as the happening of the accident, and that the date of the disablement shall be such date as the Certifying Surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given. As the Medical Referee has not allowed the appeal to him, the dates of the disablements certified, March 11 and March 12, stand as the dates of the "accidents." The county court judge decided that Jolly was entitled to an award for "compensation for disease caused to Jolly on March 11, 1929," and Boardman for compensation for disease caused to him on March 12, 1929.

The colliery company then claimed indemnity from the insurance company for the sums they had to pay Jolly and Boardman under the Workmen's Compensation Acts. The insurance company, as I understood them, took two points in answer: (1.) that the "such injury" for which the employers had to make compensation in respect of which they indemnified the employers was personal injury sustained by accident or disease, and that the workman "sustained" no such injury between March 8 and March 18, the period covered by the provisional cover; (2.) that the workmen were not "engaged in the service of the employers in work forming part of or process in" the business of the colliery between March 8 and 18.

I approach the construction of the policy from the point of view that it is intended to protect the employers against their liability to their workmen under the Workmen's Compensation Acts. No policy was actually issued. I suppose this form with which we were supplied would have been amended to exclude fatal accidents. The colliery company had asked for protection against claims by workmen employed by a sub-contractor; the form of policy supplied excludes them by mentioning "immediate service," but it does not appear whether the policy would have been issued to agree with the proposal. The cover note says nothing expressly refusing to accept the proposal on this point. But it seems to me that the policy was intended to cover the liability of the employers for the results of industrial diseases caused by the employment. When one tries to fit in these results to a scheme for compensation for accidents arising out of and in the course of the employment, this difficulty arises at once. An "accident" happens on a fixed and easily ascertainable date. But it is very difficult to say when an industrial disease, such as miners' nystagmus or lead poisoning, begins. It is a gradual deterioration due to the employment which may be going on during service by the workman under several employers in the same industry until it results in disablement which may appear when the workman has only just begun to work under a particular employer. Under these circumstances it would be very difficult for the workman to pick the proper employer to sue. The Legislature saw the difficulty, and provided a conventional and artificial means for enabling the workman to get compensation, leaving the various employers to fight out their proportion of the liability between themselves. The workman was to get a certificate from the Certifying Surgeon that he was suffering from and disabled by an industrial disease. If the surgeon could certify when the disablement commenced, he was to do so; if he could not, the date of commencement was to be the date of the certificate. The disablement so certified was to be treated as the date of the accident. That date might be when the workman was not employed at all, or when he was employed in an employment which could have nothing to do with the particular industrial disease. Parliament met this by providing that the employer liable to pay the workman should be the last employer in the particular kind of employment which caused the disability, though the workman was not in his employ at the date of the certificate. That last employer might bring in the previous employers in that kind of employment during the twelve months before the date of the disablement, and might either by proof transfer his liability to the employer under

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whom the disease was contracted, or, when the contracting was a gradual process, transfer a proper proportion of the liability to the previous employers within the twelve months from the date of the disablement. This is the result of the section as explained by the House of Lords in *Blatchford* v. *Staddon & Founds* (1) particularly in the leading judgment of Lord Sumner, which should be referred to in detail. It was argued in that case, and had been held by the Court of Appeal in *Dean* v. *Rubian Art Pottery* (2), that to succeed against an employer the workman must prove that the employer whom he sued was a "relevant employer," an employment under whom might have something to do with the disability, and if the workman had only been a day in the employment of that employer he failed to discharge the burden of proof. The House of Lords dissented from this view and overruled the *Rubian* case. (2) Lord Sumner said (3): "My Lords, I think that a scheme is thus disclosed for bringing industrial diseases into the Act of 1906, which substantially meets their peculiar features mentioned above. The way in which this is done sufficiently meets the objection that, unless shown in the clearest words, an intention cannot be imputed to the Legislature to make one employer pay for what was entirely due to the service of others. . . . . The objection was pointedly phrased by saying that 'the last employer' named in the section must mean 'the last relevant employer,' the last employer in point of time, out of and in the course of whose employment the disease had wholly or partly arisen. I think that the scheme of the section is on its face such that the last employer cannot be thus limited. The ground for making him the person from whom compensation is to be recoverable, is that he is a person certain and designated, upon whom the workman may claim without being sent from pillar to post. It is contemplated that contribution may be recovered over to a substantial extent, and for the rest the employer must protect himself by insurance, the cost of which will form part of his trade outgoings."

(1) [1927] A. C. 461.
(2) [1914] 2 K. B. 213.
(3) [1927] A. C. 469.

The section then means that the last employer within twelve months before the date of the disablement certified is primarily liable to the workman, but can discharge or distribute his liability in whole or part by proving that other employers within the twelve months have caused or contributed to the disability. The Certifying Surgeon's date of disablement is final, and is to be taken as the date of "the accident," and fixes the twelve months within which employers can be made to contribute, besides fixing the date before which you are to look for the last employer whom the workman can safely sue, whether employment by him did or did not cause or contribute to the disablement.

The employer then claims on the insurance company on the ground that he is liable to make compensation for an injury by disease, and the date of the injury or disablement is by statute and certificate finally fixed as happening between the dates for which he is provisionally covered. The insurance company would be subrogated to the rights of the employer against previous employers, if any, within the twelve months preceding the date of disablement in the certificate, and could thus transfer the whole or part of its liability to those previous employers and their insurers. But if there was no other previous employer, the decision of the House of Lords in *Simpson* v. *Thomson* (1) shows that as a man can have no legal claim on himself, the insurer gets nothing by subrogation of any right of the employer at the date of the happening of the accident as defined by statute, against himself as previous employer. This may be a casus omissus, but in the absence of express provision follows from well recognized legal principles. The employer has become liable to a claim depending on the statutory date of the accident as certified. That the insurance company in this case were aware of the importance of the certificate is shown by their question as to the number of cases of nystagmus " certified " during the year.

The appellants rely on the decision of the Privy Council given by Lord Wrenbury in *Victoria Insurance Co.* v. *Junction*

(1) (1877) 3 App. Cas. 279.

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North Broken Hill Mine. (1) In that case the employer was insured from July 1, 1920, to July 1, 1921, and the certificate stated dates of disablement from July 1 to December 31, 1921. The insurance company argued that the "happening of the accident" was not during the currency of the policy. The Privy Council declined to accept this argument. Lord Wrenbury said (2): "In this state of things their Lordships cannot give to s. 12, sub-s. 1 (*a*), the meaning for which the appellants contend. They argue that the words, 'the disablement or suspension shall be treated as the happening of the accident' mean 'the disablement or suspension shall be treated as *the date of the* happening of the accident.' That in their Lordships' judgment is not their meaning. They mean only that that which is not an accident shall, for the purposes of the Act, be treated as if it were an accident, and disablement or suspension is to be the event by whose happening the existence of this statutory accident is to be established. The disablement or suspension establishes the happening of the accident, but not the date at which it happened." And again (3): "If this be not the right view of the Act it would result that if the workman were out of employment at the date of disablement or suspension he would be without remedy."

That decision was in 1925, but in 1927 in *Blatchford's* case (4) the House of Lords reinvestigated the whole meaning of s. 43. As I read the Privy Council case, the important question for them is not when the disablement occurred, but when the disease was contracted. As I read the House of Lords case, when the disease was contracted is so difficult to prove that the workman is entitled, having got a certificate of disablement, to sue the last employer in the dangerous employment before the certified date of disablement, whether the disease was contracted in his employment or not, leaving on the employer the burden of proving that the disease was contracted in some other employment. As Lord Sumner says (5):

(1) [1925] A. C. 354.
(2) Ibid. 357.
(3) [1925] A. C. 358.
(4) [1927] A. C. 461.
(5) [1927] A. C. 470.

"The difficulty of proving the date when the disease was contracted is met by treating the date of the disablement as the date of the happening of the accident." This appears to me quite inconsistent with the Privy Council view that the disablement or suspension is not to be treated as the date of the happening of the accident. It is also inconsistent with the Privy Council view that a workman out of employment at the statutory certified date of disablement would have no remedy if the certificate meant date of the accident. He would have a remedy against the last employer within the twelve months before the certified date, but the accident would still by statute have happened on the certified date.

Lord Wrenbury, who had been clear in his views in the Privy Council case, was a party to the House of Lords decision, and began by expressing the greatest doubt on the true construction of s. 43. After discussing it, he comes to the conclusion that the "accident" is not the contraction of the disease, but the ascertainment in a definite way of its having been contracted, and that a person may be liable who was not the employer at the date of the accident. These views, which agree with Lord Sumner's, seem to me quite inconsistent with the views expressed in the Privy Council decision. Decisions of the Privy Council, though entitled to the greatest respect, are not binding on the King's Courts in England, and indeed are sometimes dissented from by the same judges sitting in the House of Lords. I think I am bound by the decision of the House of Lords to hold that an accident has happened within the period of the provisional cover against the consequences of which the insurance company is bound to indemnify the employer.

The second point raised by the insurance company is that as the workman was not being paid wages by the employer at the date of the accident, he was not then in the employer's service. The answer to this may be that contained in Lord Blanesburgh's judgment in *Blatchford's* case (1): "The word 'employment' is not, as I think, in this phrase used immediately to describe the relation between employer and

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(1) [1927] A. C. 461, 482.

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workman, a sense in which it is so frequently utilised throughout the Act and the sense in which the Court of Appeal in *Dean's* case (1) supposed it to be used here. In this phrase, as it seems to me, the word very clearly refers to the work or process in which the workman had been engaged and not to his contract with an employer to engage in it." But another and a better answer is that Parliament, to enable the workman to recover compensation, has treated him as employed at the time of the certified disablement by the last relevant employer previous to that date; and that it is this conventional and fictitious state of things that is the basis of the employers' and the insurers' liability.

A minor point raised was that as premium depended on wages, if the workmen were not paid wages at the time of the accident, they were not covered by the policy. I do not follow this result; the statutory fiction accounts for the insurers' liability.

In my view, therefore, the appeal fails and must be dismissed with costs. The insurance company can, of course, alter the terms of their policy, but if they exclude liability for some claims to which the employer is subject under the Workmen's Compensation Acts, they will probably not get any proposals by assured, who naturally desire full protection.

GREER L.J. In this appeal the Cornhill Insurance Company ask the Court to reverse the judgment of Humphreys J., whereby he decided that the respondents were entitled to be indemnified by the appellants in respect of their liability to two of their employees under the provisions of the Workmen's Compensation Act, 1925, for compensation for disablement due to an industrial disease. The appellants admitted that the respondents were liable to compensate the two workmen, but contended that their liability was not covered by the contract of insurance they had made with the appellants.

The two men whose compensation was in question in the action were Boardman and Jolly. It was admitted that though neither of the men was in fact working at the respondents' mine when their liability was certified by the Certifying Surgeon, they were still in the service of the respondents. On March 13, 1929, the Certifying Surgeon certified that Jolly was suffering from miners' nystagmus and was thereby disabled from earning full wages at the work at which he had been employed, and that his disablement commenced on March 11, 1929. On appeal to the Medical Referee the latter certified that Jolly was at the time of his examination suffering from miners' nystagmus, and that he suffered from that disease before January 1, 1929.

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(1) [1914] 2 K. B. 213.

On March 12, 1929, the Certifying Surgeon certified that Boardman was suffering from miners' nystagmus, and that the disablement commenced on March 12, 1929. In this case also the Medical Referee certified that Boardman was at the time of his examination by the Certifying Surgeon suffering from miners' nystagmus, and that he also suffered from miners' nystagmus before January 1, 1929. It seems clear, therefore, that by reason of s. 43 (*a*) of the Workmen's Compensation Act, 1925, both workmen were entitled to claim compensation from the respondents, on the hypothesis that they had been disabled by accident on March 11 and 12 respectively. Such disablement gives the workman a right to recover from the employer who last employed him during twelve months prior to the date of disablement. So far as the claim of the workman is concerned, it is immaterial whether he is in the service of the employer against whom the claim is made at the date of the certificate. The disablement, though deemed to be the happening of an accident, carries with it liability of an employer who may not have been the workman's employer at the date of the hypothetical accident. Nor is the workman bound to seek out the employer in whose employment he first contracted the disease. This is immaterial so far as the workman's claim is concerned. The compensation is payable by the employer who last employed him during the twelve months preceding the certificate in the employment to the nature of which the disease is due. If that employer alleges that the disease was contracted while in the employment of some other employer, he may join such other employer as a party to the arbitration, and if the allegation is proved, the other employer is the one from whom the compensation will be recoverable: s. 43 (iii) (*e*). Miners' nystagmus is a disease contracted by a gradual process. In the case of the two workmen whose compensation was in question, the respondents had been their employers for many years. There was no other employer who could be made liable to contribute to the compensation payable by reason of the certified disease. The effect of these provisions is thus stated by the Lord Justice-Clerk in *Russell (Archibald), Ld.* v. *Keary* (1): "This Act creates what may be called a fictitious form of accident—that is to say, the benefits of the Act entitling to compensation a workman who has suffered from an accident, are to apply to persons who have contracted a disease in an employment from which such disease may be expected. Although that is the object of the Act the language of the statute is to a certain extent complicated. Sect. 8, sub-s. 1 (*a*), provides: 'The disablement or suspension shall be treated as the happening of the accident'—that is to say, disablement occurring from disease has the same effect as if an accident had happened on a specified day." And by Lord Sumner in *Blatchford* v. *Staddon & Founds* (2): "Means had to be found for enabling the workman to recover compensation from an employer, even though he could not prove the precise time when the disease was contracted . . . . The manner of his compensation is to be as if the disease were a personal injury arising out of and in the course of the trade, in which he was employed within the twelve months previous to the date of the disablement and to the nature of which the disease was due, the disablement being treated as being the accident. . . . It will thus be seen that the modifications, subject to which compensation is to be recovered, as in the case of an accident under the Act of 1897, are considerable. They are intended to obviate the disadvantage which would handicap the workman if he had to prove disablement by disease, as if for an accident under the Act of 1897 and the equivalent sections of the Act of 1906, and they provide a means, perhaps rough and ready, of enabling a suffering workman to get compensation from some one certain, in respect of a disease contracted at a wholly uncertain time." Later, he said (1): "The difficulty of proving the date when the disease was contracted is met by treating the date of the disablement as the date of the happening of the accident."

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(1) 8 B. W. C. C. 410, 412.

(2) [1927] A. C. 461, 467.

It was with reference to this state of legal liability to compensate their workmen that the contract of insurance on which this action was brought was made. The form of policy incorporated in the contract of insurance that was operative between the parties at the dates fixed by the two certificates as the dates of disablement contained the following words: "That, if at any time during the said period, any employee in the employer's immediate service shall sustain any personal injury by accident or disease (to which at the date of the commencement of this policy the Workmen's Compensation Acts, 1906 and 1923, apply) while engaged in the service of the employer, in work forming part of or process in the business above mentioned, and in case the employer shall be liable to make compensation for such injury, either under or by virtue of the Common Law, the Fatal Accidents Act, 1846, the Employers' Liability Act, 1880, or the Workmen's Compensation Acts, 1906 and 1923, the company shall indemnify the employer against all sums for which the employer shall be so liable, and will, in addition, be responsible for all costs and expenses incurred with its consent in connection with any claim for such compensation."

The contract was obviously intended to cover the respondents' liability under the Workmen's Compensation Act, 1925, occurring during the period for which it regulated the rights of the insured. It was concerned with their statutory liability. The two men were admittedly in the service of the respondents at the dates fixed by the certificates. At those dates they sustained personal injury by disease within the meaning of the relevant Workmen's Compensation Acts, their work was that of miners, and the

(1) [1927] A. C. 470.

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respondents incurred liability to them within the meaning of the Workmen's Compensation Acts, 1906 and 1923. The respondents are therefore entitled to be indemnified in respect of such liability by the terms of the contract of insurance. I do not think there is anything in the decision of the Privy Council in *Victoria Insurance Co.* v. *Junction North Broken Hill Mine* (1) inconsistent with our decision in the present case. It decides that the provision that the date of the disablement is to be the date of the accident does not relieve the last employer during the twelve months from liability, and such an employer would be entitled to indemnity on a policy in force during the time they were the workmen's last employers. I do not think the decision touches the present case. There are some dicta in the speech of Lord Wrenbury that it would be wrong to take from their context and apply to the different facts involved in the present appeal.

It was further contended for the appellants that the liability to compensate the two men ought to be held to be outside the contract of insurance because they were not in receipt of wages, and therefore the amount of their wages would not form an element in the calculation of the premium payable by the respondents. This is admittedly the fact, but it is to be remembered that the contract of insurance is a contract to indemnify the assured against all claims during the term of the insurance by the respondents' workpeople. There is not a separate consideration for the insurance in respect of each workman. The wage calculation is a rough and ready way of ascertaining the amount of the premium. It is not unreasonable to neglect in the calculation the wages of workmen in the service but not actually working during part of the insured term, as, though such workmen might be certified as suffering from an industrial disease, they could not meet with an accident arising out of and in the course of their employment, and the risk of the certification of industrial disease might well be accepted by an insurance company without any modification of the usual method of calculating the premium payable for insurance against all claims under the Act.

(1) [1925] A. C. 354.

In my judgment the appeal must be dismissed with costs.

SLESSER L.J. In this case the respondents, the Ellerbeck Collieries, successfully claimed below that the defendants, the appellants, the Cornhill Insurance Company, are liable to indemnify the plaintiffs in respect of certain claims paid by way of compensation under the Workmen's Compensation Acts in respect of industrial disease sustained by two workmen named Boardman and Jolly while in the service of the colliery company.

According to certificates given by the Medical Referee under the Workmen's Compensation Act, 1925, on appeal by the employers from decisions of the Certifying Surgeon, William Boardman, at the time of the examination by the Certifying Surgeon—namely, March 12, 1929, was suffering from miners' nystagmus and had also suffered from miners' nystagmus before January 1, 1929. In the case of William Jolly, it was decided on appeal by the Medical Referee that he was at the time of his examination by the Certifying Surgeon—namely, March 13, 1929, suffering as from March 11 from miners' nystagmus, and also that he had suffered from miners' nystagmus before January 1, 1929.

The Certifying Surgeon, in accordance with s. 43, sub-s. 1, of the Act, had certified that the disablements commenced on March 12 and 11 respectively, but the Medical Referee, whilst stating, as I have said, that the workmen were suffering from the disease before January 1, 1929, certifies only that the workmen "are suffering from miners' nystagmus," and is silent as to the dates when disablement started, and does not disturb the finding of the Certifying Surgeon with regard to those dates.

Under the statutory forms the Medical Referee has power to allow or dismiss the appeal, and to certify the present condition of the workman as ascertained by the examination. Reg. 16, on which the form is based, in terms provides as follows: "The Medical Referee shall, in such one of the forms prescribed in the schedule hereto as may be appropriate, notify in writing his decision to the registrar of the county court, to the applicant, and to the respondent, and give a certificate (as required by s. 11, sub-s. 2, of the Workmen's Compensation Act, 1923)"—now s. 43, sub-s. 1 (*f*), of the 1925 Act—"as to the condition of the workman at the time of his examination."

In *Turton* v. *East Barnsley Colliery, Ld.* (1), Scrutton L.J. said that in his view the Medical Referee "should make such additions or modifications, as he is allowed to do by Reg. 16, as to show what he is deciding on the point whether the workman is suffering from the disease, what he is deciding on the point whether the workman is thereby disabled from earning full wages, and what he is deciding as to the date of disablement." But I can find no authority in Reg. 16 for the Medical Referee to find whether the workman was or was not suffering before the date of his examination, which is March 27, 1929, in this case.

Again, s. 43, sub-s. 1 (*f*) (in addition to the reference to the Regulations, the making of which it authorizes) requires the Medical Referee to certify as to the condition of the workman at the time when he is examined by him. By s. 43, sub-s. 2, it is provided that for the purposes of the section the date of the disablement shall be such date as the Certifying Surgeon certifies as the date on which the disablement commenced, with a proviso (*a*) to the effect that "where the medical referee allows an appeal against a refusal by a certifying surgeon to give a certificate of disablement, the date of disablement shall be such date as the medical referee may determine." This proviso does not apply in this case, as there was no refusal by the Certifying Surgeon, and the Medical Referee did not allow the appeal or determine any other date of disablement.

In these circumstances I do not think that Mr. Cave is entitled to rely on that part of the decision of the Medical Referee which states that the workmen were suffering from miners' nystagmus before January 1, 1929, and the case must therefore be treated as if that statement were not before the Court; for it could only become evidence by virtue of the

(1) [1921] 1 K. B. 369, 376.

decision of the Medical Referee under the 1925 Act, and for the reasons I have stated, in the absence of a refusal by the Certifying Surgeon to fix a date of disablement, and a successful appeal, such a decision was outside the jurisdiction of the Medical Referee, in that he attempted without authority to fix a date for the injury, not, be it noted, for the disablement, a matter beyond his powers in any event, before the time when the workman was examined by him.

In the *Victoria Insurance Co.* v. *Junction North Broken Hill Mine* (1) Lord Wrenbury said (2): "The disablement . . . . establishes the happening of the accident, but not the date at which it happened." Whether the view thus expressed is or is not consistent with the observations of Lord Sumner and other learned Lords in *Blatchford* v. *Staddon & Founds* (3) and other cases in the House of Lords which have been quoted by my Lords, I do not find it necessary to determine; but, speaking for myself, I would wish to keep this difficult question open for further consideration.

It is sufficient in the present case to say that Mr. Cave is unable, for want of evidence, to rely upon any date on which the injuries can be said to have been sustained earlier than March 12 and 11, 1929.

In the *Victoria* case (1) there was evidence that the workman contracted the scheduled disease before the granting of the statutory medical certificate. Here there is none available. Were there such evidence, it might be that the argument of Mr. Cave that the later cases in the House of Lords are dealing with notional dates for the purpose of claiming compensation, based on the statutory certificates, and not considering the date of the sustainment of the injury as between the employer and the insurer, would need careful consideration.

The evidence which was called on this matter was that of Mr. Boardman, who said that he did not find difficulty with his eyes in December and could not exactly say how long he had been suffering. It is true that Mr. Lustgarten, who appeared with Mr. Eastham for the respondents at the hearing, offered to call the other workman Jolly, but Mr. Lynskey for

(1) [1925] A. C. 354. (2) [1925] A. C. 357.
(3) [1927] A. C. 461.

the appellants said that on the facts he did not think he wanted any evidence, because the Medical Referee's report was that the disease was in existence prior to January 1. Dr. Brownley, the Medical Referee, was also called by Mr. Lynskey. He re-stated the conclusion he had come to in the certificate, that the men were suffering from nystagmus before January 1, 1929, but otherwise carried the matter no further. He gave no further medical evidence. I cannot regard this evidence as anything more than a repetition on oath of the medical certificate of the Medical Referee. The learned judge appeared to take the view that the certificate of the Medical Referee as to injury before January 1 concluded the matter—a view which I do not share; but as Mr. Lynskey was content not to call any other evidence, on a mistaken view, as I think, of the evidential value of the Medical Referee's report, the case was allowed to proceed in the absence of any further evidence that the workmen had sustained their injuries before March 12 and 11, evidence to the contrary that March 12 and 11 were the essential dates being afforded by the Certifying Surgeon's certificate and the award of the county court judge, both of whom fixed the date of disablement as March 12 and 11, 1929—dates within the cover of the insurance.

As to Mr. Cave's second argument, that the workmen were not in the service of the employer in work forming part of or process in the business, I agree that this contention fails for the reasons stated by my Lords, which I do not repeat.

I agree that this appeal must be dismissed, though on grounds based upon the evidence actually tendered in this case, rather than upon a consideration of the effects of the authorities, possibly conflicting, which in the circumstances of the case do not, in my view, call for critical examination or decision.

Appeal dismissed.

Solicitors for appellants: *W. C. Crocker, for Wood, Lord & Co., Manchester.*

Solicitors for respondents: *Calder Woods & Sandiford, for F. E. Metcalfe, Bristol.*

J. S. H.

ESHELBY *v.* FEDERATED EUROPEAN BANK, LIMITED.

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1931
Oct. 27.

[1930. E. 1927.]

Contract—Principal and Surety—Building Contract—Guarantee of Payment—Work not completed—Discharge of Surety.

A limited company employed a building contractor to execute certain repairs and decorations to a building by an agreement under seal made between the company, one T. therein called the guarantor, and a bank, and the contractor. The agreement provided that the contractor should do the work for the sum of 1500*l.*, to be paid in four equal instalments on named dates "subject to the said works being duly executed in accordance with this agreement."

By clause 11 of the agreement the guarantor agreed with the contractor and with the bank, and undertook, that the company should, subject to the said works being duly executed in accordance with the agreement, duly and punctually make to the contractor the payments mentioned above, and that upon any default for three days on the part of the company (written notice of which should be given by the contractor to the guarantor within six days of the default) in making any payment on the prescribed date, the guarantor would himself immediately make the payment so in default to the contractor.

By clause 12 the bank agreed with the contractor and undertook, that upon any default for three days or more (written notice of which should be given to the bank by the contractor within three days of the default) on the part of the guarantor in making any payment under clause 11 the bank would immediately make the payment so in default to the contractor.

The company did not pay the first instalment. The contractor gave no notice either to the guarantor or to the bank. The contractor then issued a specially indorsed writ against the bank claiming the first instalment. The case was heard by an Official Referee, who found that at the date of the writ it was necessary to spend 80*l.* in order to complete the work in accordance with the agreement. He deducted this sum from the amount claimed, and gave judgment for the plaintiff for the balance :—

Held, that the defendants were not liable.

By Scrutton and Slesser L.JJ., because it was a condition precedent to their liability that the works should be duly executed in accordance with the agreement, and the works were not so executed.

H. Dakin & Co., Ld. v. *Lee* [1916] 1 K. B. 566 distinguished.

By Greer and Slesser L.JJ., because the liability of the defendants depended upon that of T., and that he was never liable, because it was a condition precedent to his liability that the plaintiff should have given him notice of the company's default, and this notice had never been given.

Decision of the Divisional Court [1932] 1 K. B. 254 affirmed.

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APPEAL from the decision of the Divisional Court. (1)

In August, 1930, a company known as Olympus, Ld., employed the plaintiff, a building contractor, to carry out repairs and decorations to a building in Soho with a view to its future use for the accommodation of a night club. On August 28, 1930, an agreement under seal was entered into between Olympus, Ld., therein called the company, one Taglioni, therein called the guarantor, the defendants, therein called the Bank, and the plaintiff, therein called the contractor, which provided that the contractor should do the work contemplated for the sum of 1500*l.*, to be paid, as provided by clause 2, in four instalments of 375*l.* each on October 22, 1930, and January 15, April 15, and July 15, 1931. These payments were " subject to the said works being duly executed in accordance with this agreement."

The agreement contained the following clauses :—

Clause 11. " In consideration of the contractor and of the Bank at the request of the guarantor severally entering into this agreement, the guarantor hereby agrees with the contractor and by way of separate agreement hereby agrees with the Bank and undertakes as follows, that is to say : (*a*) That the company shall subject to the said works being duly executed in accordance with this agreement, duly and punctually make to the contractor the payments prescribed by clause 2 hereof, and that upon any default for three days or more on the part of the company (written notice of which shall be given by the contractor to the guarantor within six days of such default) in making any payment on the prescribed date he the guarantor will himself immediately make the payment so in default to the contractor. (*b*) The obligation of the guarantor under this clause is to be a continuing obligation."

Clause 12. " In consideration of the premises the Bank hereby agrees and undertakes with the contractor that upon any default for three days or more (written notice of which shall be given to the Bank by the contractor within three days of such default) on the part of the guarantor in making any payment under paragraph (*a*) of clause 11 hereof the Bank will immediately make the payment so in default to the contractor provided this contract has not been determined by the company."

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(1) [1932] 1 K. B. 254.

On September 8, 1930, a similar contract under seal was entered into between the same parties, which provided for the payment of a sum of 385*l.* 4*s.* by four quarterly instalments of 96*l.* 6*s.*, payable on the days named in the agreement of August 28, and whereby the Bank agreed to guarantee these payments on terms similar to those in that agreement.

On October 22, 1930, Olympus, Ld., failed to pay the first instalments, amounting to 471*l.* 6*s.*, due on that date. Taglioni having been applied to had repudiated all liability under the agreement of August 28 on the ground that he had been induced by fraud to enter into it. On November 27, 1930, the contractor issued a specially indorsed writ against the Bank claiming 375*l.* under the agreement of August 28 and 96*l.* 6*s.* under the agreement of September 8. On March 16, 1931, the case was heard by an Official Referee, who gave the plaintiff leave to amend the writ by adding to the claim the instalments which fell due on January 15, 1931. After hearing evidence the Official Referee found that at the date of the writ it was necessary to spend 80*l.* in order to complete the work in accordance with the contract. He therefore deducted this amount, and gave judgment for the plaintiff for 862*l.* 12*s.*

The defendants appealed to the Divisional Court. That Court (Swift and Charles JJ.) held that the Official Referee had no power to amend the writ by adding to the claim an amount not due at the date of the writ. They also held, distinguishing *H. Dakin & Co., Ld.* v. *Lee* (1), that the work contracted for had not been duly executed in accordance with the agreements, and that as due execution was a condition precedent to the defendants' liability, the plaintiff could not recover. Judgment was therefore given for the defendants.

The plaintiff appealed. The appeal was heard on October 27, 1931.

(1) [1916] 1 K. B. 566.

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Viscount Erleigh K.C. and *Alan Bell* for the appellant. The appellant does not now contend that the Official Referee had power to add to the writ the second instalments, which were not due when it was issued.

With regard to the first instalments the Divisional Court was wrong in holding that they were not recoverable. The only condition of the respondents' liability is a default on the part of Taglioni. His liability was to pay the appellant if Olympus, Ld., made default in paying the instalments as they fell due. It was argued in the Divisional Court that Olympus, Ld., were not in default, because the work was not duly executed in accordance with the contract, and the Divisional Court have upheld this contention. But that decision fails to give effect to the finding of the Official Referee. By giving the appellant judgment for the full contract price—albeit subject to a counterclaim—the Official Referee must have decided that the work was duly executed in accordance with the contract. In cases of this kind, where an action is brought for an agreed price of work which is to be performed according to contract, the law has construed the contract not as importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price; otherwise the least deviation would deprive the plaintiff of the whole price; and therefore in former times the building owner was obliged to pay it and recover for any breach of contract on the other side. In course of time a practice began to prevail of permitting the building owner to show that the work in consequence of the non-performance of the contract is diminished in value. Accordingly in *H. Dakin & Co., Ld.* v. *Lee* (1), where the builders had substantially completed the contract work, but there were certain defects and omissions, the Court of Appeal held that the plaintiffs were entitled to recover the agreed sum in full. Pickford L.J. said: "What the plaintiffs have done is to perform the work which they had contracted to do, but they have done some part of it insufficiently and badly; and that does not disentitle them to be paid, but it does entitle the defendant to deduct such an amount as is sufficient to put that insufficiently done work into the condition in which it ought to have been according to the contract." But this practice is only permitted in order to avoid circuity of action. It was never intended to alter, and ought not to be allowed to obscure, the principle that, where the work has been substantially performed according to the contract, the builder is entitled to the agreed sum. Conversely where the builder is entitled to recover the agreed sum, the work has been substantially performed according to the contract. The Divisional Court has avoided the consequences of *H. Dakin & Co., Ld.* v. *Lee* (1), and of earlier cases which it followed, by holding that a contract which has been substantially performed as between the building owner and the builder may yet be definitely unperformed as between the builder and the surety for the building owner. But if the same work may be duly executed according to contract as between builder and building owner and at the same time unperformed as between the builder and the surety, the guarantee must be largely illusory. This cannot have been the intention of the parties. The work must therefore be taken to have been duly executed, and Olympus, Ld., are in default.

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(1) [1916] 1 K. B. 566, 581.

It follows that Taglioni became liable to pay the contractor, and not having done so, he is in default, unless the stipulation as to notice in clause 11 of the agreement is to be taken as a condition precedent to his liability. But it is submitted that so to regard it is to give undue weight to a provision intended for the convenience of the guarantor but not directed to his liability. If Taglioni is in default the respondents are liable, unless in its turn the provision as to notice in clause 12 is a condition precedent to their liability, which, for the reasons given above, it is submitted it is not. The result is that the respondents are liable and the appellant is entitled to judgment.

Turrell for the respondents was not called upon.

SCRUTTON L.J. This is an unsatisfactory case, because the respondents have no merits. The case relates to the establishment of a night club in what was an old pickle factory, an enterprise which was undertaken by two Italians in Soho. The appellant had contracted to design and execute work upon the building partly decorative and partly constructive. The work was to be completed by September 22, 1930, of the best materials and in a proper and workmanlike manner. A first payment of 375*l.* was to be made on October 22, 1930, and this was to be followed by three other instalments at later dates. The parties to this agreement were a company known as Olympus, Ld., which was controlled by one of the Italians, Benedetto Taglioni. He was also a party to the agreement and was therein called "the guarantor." The respondents, of whom the second Italian, Diomed Caprotti, was the managing director, were parties of the third part, and the appellant, who was a building contractor of New Burlington Street, was the party of the fourth part. By clause 11 of this contract Taglioni agreed with the appellant and with the respondents that "subject to the said works being duly executed in accordance with this agreement," Olympus, Ld., would duly and punctually make to the appellant the payments specified, and that upon any default for three days or more on the part of Olympus, Ld. "(written notice of which shall be given by the contractor to the guarantor within six days of such default)", the guarantor, that is Taglioni, would himself make the payment. By clause 12 the respondents agreed with the appellant that upon any default for three days or more "(written notice of which shall be given to the Bank"—i.e., the respondents—"by the contractor within three days of such default)" on the part of the guarantor in making any payment under clause 11 the respondents would make the payment. Olympus, Ld., failed to pay the instalment due on October 22, 1930. No notice was given by the appellant to Taglioni within the six days specified in clause 11. Taglioni, when he was applied to, refused to pay. No notice within the time specified was given by the appellant to the respondents. Then the appellant sued the respondents. The case was heard by an Official Referee.

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(1) [1916] 1 K. B. 566.

When the writ was issued only the first instalment was due, but when the case came on for hearing the second instalment had fallen due. The Official Referee allowed the plaintiff to amend the writ by adding to his claim the second instalment. This was, I think, contrary to the universal practice. In the end he gave judgment for the plaintiff for the two instalments, less a sum of 80*l.* which he found it was necessary to spend before the work could be said to be complete. On appeal the Divisional Court held that the second instalment could not be recovered, and on this point there has been no appeal by the plaintiff or the Bank.

The more important point arises upon Taglioni's guarantee in clause 11 of the agreement. He undertook that Olympus, Ld., should " subject to the said works being duly executed in accordance with this agreement" duly and punctually make to the appellant the stipulated payments. It is admitted that the works were not in fact duly executed according to the agreement. They fell short of that standard by an amount of work valued at 80*l.* Taglioni refused to make any payment under clause 11 until the works were duly executed. The Official Referee hardly dealt with this point. The Divisional Court have held that it was a condition precedent to the liability of Taglioni that the sum of 375*l.* claimed by the appellant should be due to the appellant; and that this sum never was due to him, because his work was so defective that only 295*l.* was due to him. In *H. Dakin & Co., Ld.* v. *Lee* (1) a similar thing happened; but the Court thought that in the circumstances as between the building owner and the builders the work had been substantially performed and that the builders were entitled to the contract price subject to a counterclaim. The decision must turn upon the particular facts in the case, which was one between the parties to the building contract; but when the performance of a builder's contract is in dispute between the builder and the surety for the building owner, and the surety undertakes that if the work is done in accordance with the agreement the building owner shall pay, the surety's liability cannot arise where the work is not done in accordance with the agreement. The Divisional Court have so decided, and consequently that the sum of 375*l.* is not due from Taglioni to the appellant, and if Taglioni was never liable to the appellant the sureties, the respondents, cannot be liable. I agree, and that is enough to decide this case.

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(1) [1916] 1 K. B. 566.

A further point was taken that the appellant had never given to Taglioni or to the respondents the notice to which they were respectively entitled under clauses 11 and 12 of the agreement. Fortunately it is not necessary for me to decide this case upon such a point as that. In my opinion the decision of the Divisional Court was right, and the appeal must be dismissed.

GREER L.J. I agree that the appeal should be dismissed. I base my judgment upon the failure of the appellant to establish any liability on the part of the respondents. The facts necessary to involve them in a liability had not happened. They were only liable in the event of a previous liability on the part of Taglioni. Then was it proved that Taglioni was in default under clause 11? That depends upon whether the giving of the six days' notice by the appellant to Taglioni was a condition precedent to the liability of the latter. This may appear to be a technical point, but in truth it is a point of substance, because it bears upon the question whether there was any contract by the respondents to pay the money claimed. Taglioni's obligation is "that the company shall subject to the said works being duly executed in accordance with this agreement duly and punctually make to the contractor the payments prescribed in clause 2 . . . . and that upon any default for three days or more on the part of the company (written notice of which shall be given by the contractor to the guarantor"—that is to Taglioni—"within six days of such default) in making any payment on the prescribed date he the guarantor will himself immediately make the payment so in default." Thus the event on which Taglioni has agreed to make the payment is not the default by itself on the part of the company but upon default six days' notice of which

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shall have been given to Taglioni by the appellant; and no such notice was ever given. The notice is just as much a condition on which Taglioni becomes liable as the default itself is. Inasmuch as the notice was never given there was no default on the part of Taglioni, and therefore the liability of the respondents never came into existence. That is enough to dispose of this case.

Upon the other point, on which Scrutton L.J. has given judgment, I feel some difficulty, because if *H. Dakin & Co., Ld.* v. *Lee* (1) lays down a principle of law it seems to be contrary to a long series of cases ever since *Cutter* v. *Powell* (2), which decided that where work is to be done for a named sum neither that sum nor any part of it can be recovered while the work remains undone. I should not like to decide the case upon this point without further time for consideration of the question how *H. Dakin & Co., Ld.* v. *Lee* (1) is to be reconciled with *Cutter* v. *Powell.* (3) It makes no difference that the respondents are guarantors, because if the person whose performance they are guaranteeing is not liable they themselves do not become liable. Their liability depends upon his. If the appellant in the present case had not broken his contract so as to make himself liable in damages, but had only through some trifling omission failed, as the plaintiffs in *H. Dakin & Co., Ld.* v. *Lee* (1) were held to have failed, to recover the full contract price, then I am inclined to think that Taglioni on receiving the stipulated notice would have been liable to make the agreed payments, and that consequently the respondents on receiving the appropriate notice would have been liable in this action. But it is not necessary for me to decide this, and my judgment rests upon the appellant's omission to give the necessary notice.

[illegible]

SLESSER L.J. I agree. The agreement between the parties by clause 11 provides for the liability of Taglioni in certain events. He agrees with the appellant and with the respondents, and undertakes that Olympus, Ld., shall "subject to the works being duly executed in accordance with this agreement" make to the appellant the payments mentioned in clause 2. It has been found as a fact that the works never were duly executed in accordance with the agreement. It follows that Olympus, Ld., never were in default, and consequently that Taglioni was never liable.

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(1) [1916] 1 K. B. 566.

(2) (1795) 6 T. R. 320.

(3) 6 T. R. 320. Upon this question see the luminous judgment of Parke B. in *Mondel* v. *Steel* (1841) 8 M. & W. 858, 870, and generally upon this matter 2 Sm. L. C., 13th ed. (1929), pp. 19 et seq., notes to *Cutter* v. *Powell.*

Now if Taglioni was not liable the respondents were not liable either. Their liability depends on his, for they only agreed with the appellant that, upon default on the part of Taglioni in making any payment under clause 11, they would make payment. As there was, in my judgment, no default on the part of Taglioni, the respondents are not liable to the appellants.

I further agree with Greer L.J. that, through the absence of the necessary notice by the appellant, the liability of the respondents never came into existence. I can give no other meaning to the words both of clause 11 and clause 12 than that the giving of the notice in each case was one of the conditions upon which the guarantees were to be operative.

Appeal dismissed.

Solicitors for appellant: *Steadman, Van Praagh & Gaylor.*
Solicitors for respondents: *Arram, Fairfield & Co.*

W. H. G.

DAWSON LINE, LIMITED *v.* AKTIENGESELLSCHAFT ADLER FÜR CHEMISCHE INDUSTRIE OF BERLIN.

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Ship—Charterparty—Freight—Freight payable on Bill of Lading Weight less 2 per cent. in lieu of weighing—Bill of Lading understating Weight—Shipowner's Right to Indemnity.

Where by a charterparty the master is required to sign the bill of lading as presented by the charterers, and the bill of lading so presented understates the weight, the charterers are bound to indemnify the shipowner for any loss thereby resulting.

Elder, Dempster & Co. v. *Dunn & Co.* (1909) 15 Com. Cas. 49, and *Krüger & Co.* v. *Moel Tryvan Ship Co.* [1907] A. C. 272 applied.

By a charterparty the charterers were entitled to pay freight "on bill of lading weight less 2 per cent. in lieu of weighing." The shipowners, believing that more cargo had been shipped than that stated in the bill of lading presented by the charterers, had the cargo weighed at the port of discharge, where it was found that the weight had been understated:—

Held, that the charterers were not entitled to deduct 2 per cent. from the out-turn weight.

Decision of Rowlatt J. reversed.

Appeal from a decision of Rowlatt J. on an award stated in the form of a special case.

By a charterparty dated October 9, 1930, the Dawson Line, Ld., the owners of the steamship *Lady Brenda* (hereinafter called "the owners"), chartered that vessel to the Aktiengesellschaft Adler für Chemische Industrie of Berlin (hereinafter called "the charterers") to proceed to Berdiansk to load a full and complete cargo of coal-tar pitch in bulk as provided by the charterparty (clause 1), "from such suppliers as charterers may direct . . . . and being so loaded shall therewith proceed with all possible dispatch to Ghent (Belgium)."

Clause 6 of the charterparty contained these words: "Demurrage not to accrue during any time the steamer is withdrawn from charterers' disposal for loading."

Clause 11: "The bills of lading shall be in the form endorsed on the Chamber of Shipping Coasting Coal Charter, 1920, and the weights shown thereon shall be the shipper's weights. Such bills of lading to be signed by the master, agent,

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or owner of the steamer at the offices of charterers' agents within twenty-four hours after the steamer is loaded. The master may be required to sign separate bills of lading for pitch in different holds, or for parcels properly separated by charterers. . . . ."

Clause 14: "The steamer shall deliver her cargo . . . . on being paid freight at and after the rate of 12*s.* 6*d.* British sterling per ton of 20 cwts. or 1015 kilos on bill of lading weight, less 2 per cent. in lieu of weighing, but receivers to have the option (which must be declared in writing before breaking bulk) to pay on delivered weight in which event cargo to be weighed on board or alongside by official weighers. Consignees paying all expenses, but owner or agent having liberty to provide check clerk at steamer's expense. . . . ."

The steamship loaded a full and complete cargo of coal-tar pitch at Berdiansk, the total weight of which according to the shippers being approximately 4476 English tons. One bill of lading was issued for the whole cargo, and this quantity was inserted therein. The master was not satisfied that the quantity stated in the bill of lading was accurate as, according to the draught of the steamer, he calculated that a larger quantity of cargo had been shipped. On November 9, 1930, the day when the loading was completed and the bill of lading was dated, the master addressed a letter of protest to the shippers in the following terms: "Referring to the bill of lading I signed to-day, I beg to call your attention to the fact that by the steamer's draught the quantity of cargo shipped must exceed the quantity stated on the bill of lading. If at the port of discharge this is found to be the case the receivers are to be held responsible for the freight on the total quantity discharged. I am reporting this matter to my owners." The master also added at the foot of the bill of lading the words "Weight, quality, and quantity unknown to me."

The steamer proceeded to Ghent, but before her arrival there the charterers, who were also the receivers, gave notice to the owners that they would pay freight on the bill of lading quantity less 2 per cent. The owners were not prepared to accept freight upon the quantity stated in the bill of lading in view of the fact that the draught of the vessel indicated a larger quantity of cargo on board than the quantity stated in the bill of lading. The charterers advised the owners' agents that if it should be ascertained that the quantity stated in the bill of lading was a mistake, they would pay freight on the ascertained quantity less 2 per cent. The owners made arrangements to have the cargo officially weighed, and this was done, the out-turn being 4608 English tons. Thereupon the charterers admitted that the bill of lading weight was inaccurate, and, without any admission of liability and without prejudice, they paid to the owners the cost of weighing, and, further, freight calculated upon the official out-turn weight, but they deducted therefrom 2 per cent.—namely, 57*l.* 12*s.* 6*d.*, which was the amount in dispute between the parties. That sum the owners claimed from the charterers, who denied liability therefor.

The arbitrator to whom the question was referred found as a fact that the bill of lading quantity was inaccurate and that the quantity shipped was 4608 tons and not 4476 tons, but he awarded, subject to the opinion of the Court, that the owners were not entitled to recover the said sum of 57*l.* 12*s.* 6*d.*, and consequently that there was nothing due from the charterers to the owners.

The question for the opinion of the Court was whether upon the true construction of clause 14 of the charterparty the owners were entitled to be paid freight on the delivered weight or on the delivered weight less 2 per cent.

Rowlatt J. upheld the award of the arbitrator.

The owners appealed. The appeal was heard on November 16, 17, 1931.

Le Quesne K.C. and *Carpmael* for the appellants. The charterers, having put forward a bill of lading on which the weight of the cargo was understated, must indemnify the appellants against the consequences. If they were not so obliged, the charterers would benefit from their own understatement of the cargo shipped. The principle laid down in

Elder, Dempster & Co. v. *Dunn & Co.* (1) and in *Krüger & Co.* v. *Moel Tryvan Ship Co.* (2) exactly applies.

Sir Robert Aske for the respondents. The master was not bound to accept the shippers' weights: see proviso to s. 3, Art. III., of the Schedule to the Carriage of Goods by Sea Act, 1924.

[Scrutton L.J. By this charter the bill of lading must be signed with the shippers' weights. Further, the Act of 1924 does not apply to charterparties.]

In any event the shipper in this case cannot be regarded as the charterers, the charterparty plainly contemplating that a third party is to be the shipper. Accordingly the cases relied on by the appellants have no application, as in both of them the charterers presented the bill of lading.

Le Quesne K.C. in reply. The terms of the charterparty exclude the view that the shippers are different from the charterers.

[He referred to *Turner* v. *Haji Goolam Mahomed Azam.* (3)]

Scrutton L.J. This case has now been fully argued, and matters have been brought to our attention which apparently were not before Rowlatt J., and in the circumstances I think that he came to a wrong conclusion.

The difficulty arises from the fact that in respect of a cargo of coal-tar pitch a wrong weight was inserted in the bill of lading, coupled with this, that the charterparty contains a clause that freight may be paid on the bill of lading weight less 2 per cent. in lieu of weighing, with an option to the receiver to pay on delivered weight, in which case he pays the cost of weighing. The question is what is the position when the bill of lading understates the weight, and this is ascertained when the cargo is weighed.

This clause about paying freight on the weight in the bill of lading less 2 per cent. because the cargo is not weighed on delivery has been in existence for a long time. One of its justifications is that if the shipowner has to weigh the

(1) 15 Com. Cas. 49.

(2) [1907] A. C. 272.

(3) [1904] A. C. 826.

cargo, he is obliged to keep the ship longer than he otherwise would, and if he is not required to weigh he allows the receiver to pay on the bill of lading weight less 2 per cent. in order that he may get his ship away earlier. An instance of the operation of the practice may be found in *Dillon* v. *Livingston, Briggs & Co., and Peninsular and Oriental Steam Navigation Co.* (1) The Peninsular and Oriental Co. received every year in Bombay 50,000 tons of coal. It was no advantage to them to get the coal unloaded quickly, inasmuch as they always had large stocks, and so they were quite content to pay on the delivered weight; but as the ship wanted to get away as soon as possible, the master asked the company's Bombay agents to give the ship a speedy discharge by waiving their right to have the cargo weighed. A question arose whether the master had authority to make that bargain, and the evidence was that the company had always had the alternative offered them of having the cargo weighed, which would involve keeping the ship longer, or paying freight on the bill of lading weight less 2 per cent. The evidence was that the average shortage on the out-turn of coal was 1 per cent.

In this case the ship complains that it has had to weigh the cargo and so has not saved time, while the receivers say they are liable to pay freight less 2 per cent. on cargo less than that actually carried. Rowlatt J. thought that this looked wrong.

By the charterparty the charterers have contracted to supply a full cargo of coal-tar pitch at Berdiansk from such suppliers as they might direct. The charterers are to get the cargo from the suppliers whom they nominate. The charterers are to put the cargo on board, and the charterparty provides by clause 11 that: "The bills of lading shall be in the form endorsed on the Chamber of Shipping Coasting Coal Charter, 1920, and the weights shown thereon shall be the shipper's weights." The shippers in this case were the charterers' agents to supply the cargo, and by the charterparty the bills of lading were to be signed "by the master, agent, or owner of the steamer at the offices of charterers'

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(1) (1895) 11 Times L. R. 312.

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agents within twenty-four hours after the steamer is loaded. The master may be required to sign separate bills of lading for pitch in separate holds, or for parcels properly separated by charterers." Owing to the draught of the ship, the master thought from the start that there was more cargo on board than the shippers' weight, and accordingly he put on the bill of lading: "Weight, quality, and quantity unknown to me." He was, however, there to sign the bill of lading with the weight stated thereon though he suspected it was incorrect. The shipowners said they would weigh the cargo on discharge and they did so, the quantity delivered being found to be 4608 tons, that is, 130 tons more than the shippers' weight. There is no suggestion of fraud. The charterers recognized that something ought to be done and, without prejudice, they paid not on the bill of lading weight but on the delivered weight, from which, however, they claimed to make the 2 per cent. deduction because they had not asked the ship to weigh. To that the ship objected.

Before Rowlatt J. it does not appear that the effect of the clause in the charterparty by which the master had to sign bills of lading with the shippers' weights was argued. That question has been discussed in two cases, both in the House of Lords, which in my opinion show that the view taken by Rowlatt J. was erroneous. In *Elder, Dempster & Co.* v. *Dunn & Co.* (1) the charterer presented a bill of lading with wrong marks, in consequence of which the ship got into difficulties through not delivering the goods according to the marks. The House of Lords held that such a tender of a bill of lading by the charterer involved the obligation upon him to indemnify the ship against any injurious consequences thereby caused. A somewhat similar point arose in *Krüger & Co.* v. *Moel Tryvan Ship Co.* (2) There also the master had to sign bills of lading as presented. The charterers presented a bill of lading which made the shipowners liable for negligence, and by this the shipowners were exposed to liability. The shipowners claimed to be indemnified by the charterers in respect of the injurious consequences following upon the presentation of the bill of lading not in accordance with the charterparty. The House of Lords held that the charterers were liable to indemnify the shipowners. In those cases I was counsel for the successful parties, and I remember that considerable discussion took place as to the lines upon which the claim to indemnity should be put. Some of the judges and law lords said that the charterers were liable on two grounds. The first of these was that a right to indemnity followed from the terms of the charterparty, because it required the master to sign bills of lading in a particular form, and consequently that the charterers must be liable if loss followed in consequence of presenting inaccurate bills of lading. The second ground—and this has nothing to do with the charterparty but turns upon the principle stated in *Sheffield Corporation* v. *Barclay* (1), and *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (2)—that a mere request from the charterers, involving, as it did, the shipowners in a liability in which otherwise they would not have been involved, raised the implication of an indemnity against those consequences. Some of the judges and law lords took one view, some the other, and some both. In this case it is sufficient to say that as the master was required to sign the bill of lading as presented to him, the charterers were bound to present an accurate bill of lading as to the weight shipped. The shippers were the charterers' agents to supply the cargo and present the bill of lading; they presented an inaccurate bill of lading with consequent loss. The charterers must therefore make good that loss.

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(1) 15 Com. Cas. 49.

(2) [1907] A. C. 272.

Sir Robert Aske pointed out that there are clauses in the Schedule to the Carriage of Goods by Sea Act, 1924, which affect the question. In my opinion it is unnecessary to consider these, as the Act does not apply to charterparties, and the liability in this case is a liability arising from the charterparty and the provision therein that the bill of lading is to be signed by the master as presented by the charterers' agents.

(1) [1905] A. C. 392.

(2) (1886) 34 Ch. D. 261, 272.

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The result at which we arrive I am glad to think fits in with the commercial aspect of the case. For the charterers to claim the deduction of 2 per cent. from the freight when the ship was not saved weighing is wrong. The appeal must be allowed, and the ship held entitled to recover the sum claimed.

GREER L.J. I have come to the same conclusion as my Lord that this appeal should be allowed, but not without having encountered a number of difficulties. My only reason for giving a separate judgment is that I am anxious that nothing should be said which might throw doubt on one of the fundamental principles of our law—namely, that if people adopt a written form of words to regulate their contractual obligations those obligations are to be found in that document, and the Court will not lightly weaken its effect by reading in qualifications or implied undertakings inconsistent therewith. It seems to me, especially at the present day, most important that there should be certainty with regard to the law, and if this case depended solely upon the words used in the charterparty, I should have come to the conclusion that the shipowners, by the express terms of the charterparty, have agreed to accept freight measured by the bill of lading weight, and that there is nothing in the charterparty from which there can be implied an exception to that obligation. But I agree that the position may be altered by reason of some collateral contract between the parties, and I regard the two cases: *Elder, Dempster & Co.* v. *Dunn & Co.* (1) and *Krüger & Co.* v. *Moel Tryvan Ship Co.* (2), as meaning this and no more, that if the charterer or some person for whom he is responsible, presents a bill of lading to the master which the latter is bound to sign as part of the terms of the contract, there may be implied from the act of presenting the bill of lading, taken together with the terms of the contract, a warranty of the correctness of the figures, description, or marks stated in the bill of lading.

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(1) 15 Com. Cas. 49.

(2) [1907] A. C. 272.

The only question which is not without difficulty in the case is whether, having regard to the terms of the charterparty, we are entitled or bound to treat the charterers as presenting the bill of lading for signature. At one time I was inclined to think that the charterers could not be so treated, but Mr. Le Quesne has called attention to the language used in several clauses of the charterparty which has led me to the conclusion that it is right in this case to treat the suppliers when they presented the bill of lading for signature as the agents of the charterers. By clause 1 the steamship is to "load at a usual berth or berths as customary a full and complete cargo . . . . from such suppliers as charterers may direct." That means that the charterers have undertaken that they will direct other people to perform the obligation they themselves have undertaken to load the ship. That view is confirmed by clause 6, which contains these words: "Demurrage not to accrue during any time the steamer is withdrawn from charterers' disposal for loading,"—again indicating that for the purposes of the performance of this charterparty whoever in fact brings the cargo to the ship to be put on board is to do this on behalf of the charterers. Clause 11 contains a reference to the bill of lading being signed by the master, agent, or owner of the steamer at the offices of charterers' agents, further indicating to my mind that the charterers were the persons who by their agents were loading the vessel and who presented the bill of lading to the master for signature. In those circumstances it seems to me that the case is covered by the two decisions to which I have referred. It does not seem to me to matter in this case whether the right view is that the freight should first be paid and then that there should be a counterclaim for breach of contract. That would be an unbusinesslike way of dealing with the question. As I understand, the arbitrator was asked to decide the question of principle—namely, whether the loss should be borne by the one party or the other, subject to our view. Our view is that it should be borne by the charterers and not by the shipowners.

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SLESSER L.J. I agree that this appeal should be allowed for the reasons stated by Greer L.J., with whose judgment I exactly associate myself.

Appeal allowed.

Solicitors for appellants: *Middleton, Lewis & Clarke, for Downing & Handcock, Cardiff.*

Solicitors for respondents: *W. & W. Stocken.*

J. S. H.

Applied. CURTIS *v.* CHEMICAL, ETC., CO. [1951] 1 K. B. 805

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THE KING *v.* KYLSANT (LORD).

Criminal Law—Company—Publication of False Prospectus—Statements in Prospectus True—Omission of material Facts—False Impression of Company's Position—Larceny Act, 1861 (24 *&* 25 *Vict. c.* 96), *s.* 84.

By the Larceny Act, 1861, s. 84, a director of a body corporate or public company is guilty of a misdemeanour if he makes, circulates or publishes any written statement or account which he shall know to be false in any material particular with intent to induce any person to intrust or advance property to the company.

A prospectus for the issue of debenture stock issued by a company of which the appellant was chairman was composed of statements which in themselves were perfectly true, but it omitted information about the company's affairs, with the result that the prospectus, taken as a whole, gave a false impression of the position of the company. On the trial of the appellant for an offence under s. 84 of the Larceny Act, 1861, the judge directed the jury that a written statement might be false within the meaning of the section not only because of what it stated, but also because of what it concealed, or omitted, or implied:—

Held, that this was a correct statement of the effect of the section, and that the appellant was rightly convicted of an offence under it.

Dicta of Lord Macnaghten in *Gluckstein* v. *Barnes* [1900] A. C. 240, at p. 250; of Lord Chelmsford and Lord Cairns in *Peek* v. *Gurney* (1873) L. R. 6 H. L. 377, at pp. 386 and 402; and of Lord Halsbury L.C. in *Aaron's Reefs, Ld.* v. *Twiss* [1896] A. C. 273, at pp. 281 and 284, applied.

THE appellant was convicted at the Central Criminal Court, under s. 84 of the Larceny Act, 1861 (1), of making, circulating, or publishing, or concurring in making, circulating, or publishing, a written statement—namely, a prospectus relating to an issue of 2,000,000*l.* 5 per cent. debenture stock, which he knew to be false in a material particular, with intent to induce persons to intrust or advance property to the Royal Mail Steam Packet Company, he being a director of that company. Other charges under the section with regard to certain accounts issued by the company were also preferred against him, but of those charges he was acquitted.

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(1) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 84: "Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent . . . . to induce any person . . . . to intrust or advance any property to such body corporate or public company . . . . shall be guilty of a misdemeanour. . . ."

The prospectus in question stated (inter alia) that the capital of the company, issued and fully paid, amounted to 8,800,000*l.*, that there already existed 1,400,000*l.* 4½ per cent. debenture stock and 3,100,000*l.* 5 per cent. debenture stock, and that the reserve fund amounted to 1,450,000*l.* and the insurance fund to 1,311,755*l.* The prospectus went on to state that the object of the proposed issue of debenture stock was to provide additional capital for the new freehold building of the company and for the general purposes of the company. It stated the number of ships owned by the company and by other companies which it controlled, and continued :—

" The interest on the present issue of debenture stock will amount to 100,000*l.* per annum.

" Although this company in common with other shipping companies has suffered from the depression in the shipping industry, the audited accounts of the company show that during the past ten years the average annual balance available (including profits of the insurance fund), after providing for depreciation and interest on existing debenture stocks, has been sufficient to pay the interest on the present issue more than five times over.

" After providing for all taxation, depreciation of the fleet, etc., adding to the reserves and payment of dividends on the preference stocks, the dividends on the ordinary stock during the last seventeen years have been as follows :—"

A table was then set out showing that, between 1911 and 1927, the company had paid dividends varying from 5 to 8 per cent., except in 1914, when no dividend was paid, and in 1926, when a dividend of 4 per cent. was paid.

It was admitted that every statement in the prospectus, in itself, was true, but the prosecution alleged that the document as a whole was misleading and false within the meaning of s. 84, in that it failed to state that, although the company made very large profits in 1918, 1919 and 1920, when, owing to the European war, there was a shipping "boom," in 1921, 1922, 1923, 1924, 1925, 1926 and 1927 it made substantial trading losses, and was only able to pay the dividends specified and to produce the "balances available," in those years (which latter averaged 585,673*l.* for the ten years 1918 to 1927 inclusive) by the introduction of items of a non-recurring nature, earned in the abnormal war period, such as repayments by the revenue authorities in connection with excess profits duty and adjustments of income tax reserves, the war contingency reserves, deferred repairs account and so on.

In the course of his summing-up at the trial, Wright J. said, referring to s. 84: "'Make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he [i.e., the defendant] shall know to be false in any material particular.' What exactly does that mean? The conclusion I have arrived at is that it is not limited to a case where you point to a written account or a written statement and say: 'Here are certain figures, here are certain words, which are false.' I think that is to narrow unduly the words 'in any material particular.' It is perfectly true that a criminal Act must be strictly construed, but it must be reasonably construed, and, in my judgment, to construe this section in that way would be to shut out a type of fraud in connection with written documents or written accounts which may be of the utmost importance, and that is the type of fraud which may be found in a document, not fraudulent in the sense of what it states, but in the sense of what it conceals or omits. . . . . I think the language which is used . . . . will cover the case where you have a written statement which is false, not in any specific words or any specific figures which it contains, but which is false in the way in which a document may be fraudulent, namely, where you may take every word and every figure and say: 'Now, there is nothing false about this, there is nothing false about that,' but the document as a whole may be false, not because of what it states, but because of what it does not state, because of what it implies. Of course, that type of falsity, which is indeed the type of falsity in the main in question here, is more difficult to establish than where you can point to a specific false word in a sentence, because, where the falsity consists of a fraudulent desire to create a false impression, while keeping accurately to the limited facts which appear in the document, you have to show affirmatively that there was a deliberate intent to create a false impression. If you have a definite falsehood, that speaks for itself. . . . . That is a much simpler case than where a written statement is alleged to have been false in the sense that it concealed the true facts. . . . . But to construe s. 84 so as to exclude from its ambit that type of fraud in a written statement of account is, in my judgment, to limit unduly the scope of the enactment, to exclude from it some of the most important types of false documents which in this class of case may have to be dealt with and—which, I think, is the guiding feature—to do an injury to the language [of the section] . . . . I think that the construction which I have given to it is the true construction."

The appellant appealed on the grounds that there was no evidence that he had committed the offence specified in the section and that Wright J. misdirected the jury in telling them that, to constitute an offence under the section, it was not necessary that any specific statement or figure in the prospectus should be false, but that, although every statement and figure in the prospectus was true, if the prospectus was misleading, the appellant was guilty of the offence with which he was charged.

Sir John Simon K.C., *Singleton K.C.* and *Wilfrid Lewis* for the appellant. Every word of the prospectus is true, and the crucial question is how far it is material to consider omissions from the document. The Larceny Act, 1861, s. 84, does not penalize mere economy of information. It is for

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the prosecution to show either that the words used in the prospectus were themselves false, or that they would be rendered false if the particulars omitted were added. Here, if the particulars omitted were added to the prospectus, the original words would remain true. Wright J. misdirected the jury as to the effect of s. 84.

Sir William Jowitt A.-G. and *Eustace Fulton* for the Crown. The word "false" in s. 84 of the Larceny Act, 1861, includes a document which, by stating some things and omitting others, conveys a false impression. The whole document must be considered in deciding the impression which would be produced by it. Here the impression created by the prospectus was that persons could safely invest money in the company, whereas the truth was that, during the last seven years of the relevant period, dividends had been paid and the "average annual balances available" had been procured only by recourse to funds which had been stored up during previous abnormal and irrelevant years.

The judgment of the Court (AVORY, BRANSON and HUMPHREYS JJ.) was delivered as follows by

AVORY J. [who stated the facts and read the passages in Wright J.'s summing-up which were alleged to constitute misdirection and the grounds of appeal, and continued :] It is convenient now to refer to the authorities which, in our opinion, support the view of the law expressed by Wright J. in summing up.

In *Gluckstein* v. *Barnes* (1) Lord Macnaghten said : "It is a trite observation that every document as against its author must be read in the sense which it was intended to convey. And everybody knows that sometimes half a truth is no better than a downright falsehood."

In *Peek* v. *Gurney* (2), where the contents of the prospectus of a company formed to purchase the business of a firm were under discussion, Lord Chelmsford said : "It cannot be denied that if the condition of the firm of Overend & Gurney had been disclosed the result must have been their stoppage,

(1) [1900] A. C. 240, 250.

(2) (1873) L. R. 6 H. L. 377, 386.

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and no hope could have been entertained of establishing a joint stock company upon the basis of a concern in such a state. The foundation of the projected company was therefore necessarily laid in concealment; and to render the scheme attractive to the public the promoters were not only compelled to hide the truth, but to give such a colour to the statements put forth in the prospectus as to render them (though perhaps literally true), yet, in the sense in which they must have known the statements would be understood by the public, really false." In the same case Lord Cairns said (1): "Did the respondents, in the prospectus issued as to the company, make representations which in point of fact were untrue? . . . . I entirely agree with what has been stated by my noble and learned friends before me, that mere silence could not, in my opinion, be a sufficient foundation for this proceeding. Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would in my opinion form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."

In *Aaron's Reefs, Ld.* v. *Twiss* (2) Lord Halsbury L.C. said: "It remains only to consider the final question, namely, whether or not there was evidence for the jury which would justify them in finding that this was a fraudulent prospectus—that these statements were fraudulent and false. Now, in dealing with that question, again I say I protest against being called on only to look at some specific allegation in it; I think one is entitled to look at the whole document and see what it means taken together. Now, if you look at the whole document taken together, knowing what we now know and what the jury had before them, I suppose nobody can doubt that this was a fraudulent conspiracy. . . . It is

(1) L. R. 6 H. L. 377, 402.

(2) [1896] A. C. 273, 281.

said there is no specific allegation of fact which is proved to be false. Again I protest, as I have said, against that being the true test. I should say, taking the whole thing together, was there false representation ? I do not care by what means it is conveyed—by what trick or device or ambiguous language : all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false although if one takes each statement by itself there may be a difficulty in shewing that any specific statement is untrue." Later in his judgment (1) Lord Halsbury says : "The whole of this transaction seems to me to have been fraudulent to the last degree, and I entirely concur with those learned judges who, in very plain language, said that the persons engaged in this transaction were guilty of a fraudulent conspiracy, and might have been indicted for it."

In the opinion of this Court, those authorities are sufficient to support the summing-up in so far as it deals with the question of law which arises in this case. It is true that the opinions which I have read were expressed in civil proceedings, but we think that the principles laid down in them are none the less applicable here, especially in view of the fact that in *Aaron's Reefs, Ld.* v. *Twiss* (2) Lord Halsbury expressed his view with regard to criminal, as well as civil, liability. In the present case Wright J. more than once specifically called the attention of the jury to the distinction between criminal liability and possible civil liability.

In the opinion of this Court there was ample evidence on which the jury could come to the conclusion that this prospectus was false in a material particular in that it conveyed a false impression. The falsehood in this case consisted in putting before intending investors, as material on which they could exercise their judgment as to the position of the company, figures which apparently disclosed the existing position, but in fact hid it. In other words, the prospectus

(1) [1896] A. C. 284.

(2) [1896] A. C. 273, 284.

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implied that the company was in a sound financial position and that the prudent investor could safely invest his money in its debentures. This inference would be drawn particularly from the statement that dividends had been regularly paid over a term of years, although times had been bad—a statement which was utterly misleading when the fact that those dividends had been paid, not out of current earnings, but out of funds which had been earned during the abnormal period of the war, was omitted.

His Lordship said that there was ample evidence that Lord Kylsant knew that the prospectus was false in the sense indicated and that it was not, and could not be, disputed that the prospectus was published with the intention of inducing persons to intrust or advance property to the company. He concluded: We come, without hesitation, to the conclusion that in the summing-up, regarded as a whole, there was no misdirection, that there was ample evidence on which the verdict of the jury can be supported, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Holmes, Son & Pott.*
Solicitor for Crown: *Director of Public Prosecutions.*

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THE KING *v.* SURREY JUSTICES.

Ex parte WITHERICK.

Motor-car—Offence—Driving "without due care and attention or without reasonable consideration for other persons using the road"—Conviction—Two separate Offences—Duplicity—Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 10—*Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 12, *sub-s.* 1.

The appellant was convicted before justices on an information which charged him with driving a motor vehicle on a road "without due care and attention or without reasonable consideration for other persons using the road contrary to s. 12 of the Road Traffic Act, 1930":—

Held, that the section created two separate offences and that the conviction was bad for duplicity, the appellant having been charged with those two offences in the alternative.

Rex v. *Jones; Thomas, Ex parte* [1921] 1 K. B. 632 and *Rex* v. *Wells* (1904) 68 J. P. 392, considered and applied.

Rule Nisi for certiorari.

This rule directed to the justices for the Godalming Petty Sessional Division of Surrey, required them to show cause why a conviction before them of one Edward Lionel Witherick "for that he on the 12th day of May, 1931, at High Street, in the borough of Godalming, did drive a motor-car without due care and attention or without reasonable consideration for other persons using the road contrary to s. 12 of the Road Traffic Act, 1930" (1), should not be quashed.

The grounds for the rule were that two offences appeared in the information and in the conviction thereon, and that the justices were wrong in law in acting contrary to the terms of s. 10 of the Summary Jurisdiction Act, 1848 (2), which provides that every information shall be for one offence only.

Fortune showing cause against the rule for the justices. Sect. 12, sub-s. 1, of the Road Traffic Act, 1930, creates only one offence, although it is expressed in the alternative. If a man is driving "without due care and attention" he must ipso facto be driving "without reasonable consideration for other persons using the road," and vice versa. The position is the same as in *Rex* v. *Jones; Thomas, Ex parte* (1), where it was held that a man might properly be convicted under s. 1 of the Motor Car Act, 1903, of driving "recklessly and at a speed dangerous to the public," since the driving of the car was one indivisible act which might constitute both the offences charged. It is true that in *Rex* v. *Wells* (2) it was held that a conviction under s. 1 of the Motor Car Act, 1903, for "driving at a speed or in a manner which is dangerous to the public" was bad for duplicity, but those words are very different from the words of s. 12 of the Act of 1930.

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(1) By the Road Traffic Act, 1930, s. 12: "(1.) If any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road he shall be guilty of an offence."

(2) By the Summary Jurisdiction Act, 1848, s. 10: ". . . . every . . . . information shall be for one offence only, and not for two or more offences. . . ."

Vine in support of the rule. Sect. 12 of the Act of 1930 is aimed at two distinct and different classes of offenders: (1.) the driver who is careless, but not necessarily without consideration for other persons using the road, and (2.) the selfish driver, who may be quite careful so far as his own safety is concerned, but completely disregardful of the comfort and convenience of other people. The offences contemplated by the section are distinct and different and they must not be charged in one information. A person in the position of the appellant does not know precisely of what he has been convicted.

AVORY J. This is an application for a writ of certiorari to bring up a conviction under s. 12 of the Road Traffic Act, 1930, to be quashed on the ground that two offences appear in the information and in the conviction contrary to s. 10 of the Summary Jurisdiction Act, 1848, which provides that every information shall be for one offence only, and not for two or more offences.

In my view, the whole question in this case is whether s. 12 of the Act of 1930 can be read as comprising two separate offences or whether it creates only one. Mr. Fortune has in effect invited the Court to say that this section means:

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(1) [1921] 1 K. B. 632.

(2) 68 J. P. 392.

"If any person drives a motor vehicle on a road without due care and attention *and* without reasonable consideration for other persons using the road he shall be guilty of an offence," and he contends that it is not possible for a person to drive without due care and attention without at the same time driving without reasonable consideration for other persons using the road. If that could be established, and if this conviction had been in the form "without due care and attention *and* without reasonable consideration, ..." I do not think that any objection could have been taken to it.

On consideration of this section, however, I have come to the conclusion that it contemplates two separate offences: (1.) driving without due care and attention, and (2.) driving without reasonable consideration for other persons using the road. It is not necessary to give illustrations of how a man may be driving with due care and attention, so far as his own safety is concerned, and yet driving without reasonable consideration for other persons, but, if a person may do one without the other, it follows as a matter of law that an information which charges him in the alternative is bad. It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading autrefois convict.

The cases which have been cited of *Rex* v. *Jones; Thomas, Ex parte* (1) and *Rex* v. *Wells* (2) clearly illustrate the distinction which is to be drawn between charging offences in the alternative and charging that a man may by one act have committed two offences. In *Rex* v. *Jones; Thomas, Ex parte* (1) it was held that a man might properly be convicted of driving "recklessly *and* at a speed which is dangerous to the public" since the act of driving was one indivisible act. On the other hand, in *Rex* v. *Wells* (2), the defendant was charged with driving at a speed *or* in a manner which was dangerous to the public. A conviction in those terms was held to be bad for duplicity, because he had been charged in the alternative.

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(1) [1921] 1 K. B. 632.

(2) 68 J. P. 392.

Although this case was well worthy of argument, I have come to the conclusion that this conviction was bad on the face of it and that the rule must be made absolute.

The justices have taken the unusual course of appearing by counsel. There is a convenient and inexpensive course open to justices against whom a rule is granted of filing an affidavit (which has not even to be stamped) and leaving the prosecutor to appear to show cause by counsel if he thinks fit. It is not usual to grant costs against justices, and the present rule will be made absolute with costs against the prosecutor, who was served with the rule, but has not appeared.

SWIFT J. I agree.

HUMPHREYS J. I agree.

Rule absolute.

Solicitors showing cause: *Taylor, Jelf & Co., for A. P. V. Moon, Godalming.*

Solicitors for the rule: *Amery-Parkes & Co.*

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REEVE *v.* WALKER.

Poor Law—Relief—Provision of Work and Wages—Poor Law Act, 1930 (20 *Geo.* 5, *c.* 17), *s.* 150.

The appellant was convicted, under s. 150 of the Poor Law Act, 1930, of making a false statement to a relieving officer for the purpose of obtaining relief for himself and his wife. The false statement in question was made to induce the relieving officer to give to the appellant a card entitling him to work on the roads maintainable by the local authority and to be paid for his work a sum of 23*s.* No benefit other than the employment to be provided and the payment to be made was sought or received by the appellant:—

Held, that the provision of work and wages constituted relief within s. 150 and that the appellant was rightly convicted.

CASE stated by justices.

At a court of summary jurisdiction sitting at Downham Market an information was preferred by the respondent, Edward Albert Walker, against the appellant, Harry Reeve, charging that the appellant, on March 31, 1931, at the parish of Downham Market, did, "for the purpose of obtaining relief for himself" and his wife "wilfully . . . . make . . . . a false statement" to the respondent, a relieving officer of the Norfolk County Council, contrary to s. 150 of the Poor Law Act, 1930. (1)

On the hearing of the information the following facts were proved or admitted:—

On March 31, 1931, the appellant, an able-bodied man within the meaning of the Poor Law Act, 1930, and the Orders and Regulations made thereunder, was an unemployed person, save only that for some weeks he had been employed on the Norfolk County Council roads on what was called by the respondent "relief work." On March 31, 1931, the appellant falsely stated to the respondent that he (the appellant) had not refused work, meaning thereby that he had not been offered employment by an employer of labour and had refused to accept that offer. The false statement so made by the appellant was made for the purpose of inducing the respondent, as relieving officer, to give him a card which would entitle him to be employed on the Norfolk County Council roads for four and a-half days in the next succeeding week for a payment of 23*s.* No relief other than the employment so to be provided and/or the 23*s.* to be paid was sought or received by the appellant and, in particular, no relief in kind was granted to or was obtained or sought by him.

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(1) Poor Law Act, 1930, s. 150: "If any person for the purpose of obtaining relief for himself or for any other person wilfully gives a false name, or makes or uses a false statement to the council of any county or county borough or any of their officers concerned with the relief of the poor, he shall be deemed an idle and disorderly person within the meaning of section 3 of the Vagrancy Act, 1824."

The respondent produced his authority to prosecute and put in a certificate of chargeability under s. 158 of the Poor Law Act, 1930.

The justices were of opinion that the employment sought by the appellant and/or the 23*s.* to be paid to him therefor was "relief" within the meaning of s. 150 of the Poor Law Act, 1930. They, therefore, held that the false statement made by him was made "for the purpose of obtaining relief," and they convicted him, ordering him to pay a fine and costs.

The question on which the opinion of the Court was desired was whether the justices had come to a correct determination in point of law.

Havers for the appellant. The conviction of the appellant was wrong. Employment and/or the remuneration to be paid for it is not relief within s. 150 of the Poor Law Act, 1930. Relief and work for wages are clearly distinguished in s. 15 of the Act of 1930, where reference is made in sub-s. 1 (*a*) to setting to work able-bodied persons, and in sub-s. 1 (*b*), to providing relief for those not able to work. Similarly, s. 45, sub-s. 1, of the Act, taken together with para. 7 of the Relief Regulation Order, 1930 (St. R. & O., 1930, No. 186), made under the Act, shows that outdoor relief given to able-bodied persons or to their families must be such as admits of at least one-half of it being given in kind. That is not the case where work and wages are provided and, if the provision of work and wages were relief, it would be unlawful by s. 45, sub-s. 2, of the Act.

Vernon Gattie for the respondent. The employment to be provided for the appellant and/or the 23*s.* to be paid to him as remuneration was relief within s. 150 of the Poor Law Act, 1930. That the provision of work and wages is relief appears from s. 70 of the Act, which gives local authorities power to employ poor persons in the cultivation of land and to "pay to the persons so employed by them who are not in receipt of *other* relief reasonable wages for their work." Para. 6 of the Relief Regulation Order, 1930, refers to the formulation of arrangements for setting to work able-bodied men "to whom relief other than institutional relief is afforded." That the provision of work and wages may be relief was clearly the opinion of Lindley M.R., when he said, in *Attorney-General* v. *Merthyr Tydfil Union* (1), that "poor persons physically able to work, but who could not obtain work, were entitled to relief by having work found for them at the expense of the ratepayers, if no other work could be found."

AVORY J. The question raised by this Case stated appears to me to come to this: Can a sum paid to a man for work done by him and provided in the manner described in the Case, properly be described as relief within s. 150 of the Poor Law Act, 1930?

We have been referred to s. 15 of the Act, which clearly contemplates able-bodied men who may be set to work, and also to s. 45. It is plain that s. 45 does not enable the Minister of Health to declare by Regulations what shall and what shall not be deemed to be relief. It only enables him to declare to what extent and for what period outdoor relief is to be given to able-bodied persons. That is all-important when we come to consider the Relief Regulation Order, 1930, para. 7 of which provides that "Whenever the Council allow relief other than institutional relief to any able-bodied man, one-half at least of the relief so allowed shall be relief in kind." It is admitted in the present case that there was no relief in kind and, therefore, if what was allowed here was relief, one-half of it was not in kind and, consequently, did not comply with para. 7. In my opinion, however, the fact that the relief which was, I think, granted in this case did not comply with para. 7 of the Order did not prevent what was done being relief within s. 150.

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(1) [1900] 1 Ch. 516, 543.

We have been referred to the judgment of Lindley L.J. in *Attorney-General* v. *Merthyr Tydfil Union* (1), where he sets out the kinds of relief which could be granted under the poor law which was in force before 1834, and I have no doubt that work coupled with payment, or payment coupled with work, may be relief within the meaning of the Act of 1930.

It is, however, further said on behalf of the appellant that the effect of s. 45, sub-s. 2, of the Act and para. 7 of the Relief Regulation Order, 1930, when read together, is inconsistent with the construction which I have put on s. 150 of the Act. Sect. 45, sub-s. 2, provides that all relief which is given contrary to the Rules, Orders, or Regulations made by the Minister of Health to regulate outdoor relief to able-bodied men, " shall be unlawful and shall be disallowed in the accounts of the person giving the relief." What has been done in this case may be unlawful and may be the subject of a surcharge in the accounts, but, in my opinion, it still remains relief in the shape of money coupled with work. That work, coupled with payment, may be relief within the meaning of s. 150, receives additional support from s. 70 of the Act of 1930, which refers to the employment of poor persons in the cultivation of land and the payment of reasonable wages to those of them " who are not in receipt of other relief." The words " other relief " seem to contemplate that reasonable wages paid for work may be relief within the meaning of the statute.

For these reasons I think that the provision for the appellant of work and wages was a grant of relief, that his

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(1) [1900] 1 Ch. 516, 543.

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conviction under s. 150 was right, and that this appeal should be dismissed.

SWIFT J. I agree.

HUMPHREYS J. I agree.

Appeal dismissed.

Solicitors for appellant: *E. C. Rawlings, Butt & Bowyer, for J. W. C. Daynes, Son & Keefe, Norwich.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for H. C. Davies, Norwich.*

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Applied. EDLER *v.* AUERBACH [1950] 1 K. B. 359

C. A.

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July 22, 23, 24;
Oct. 26.

BOTTOMLEY AND ANOTHER *v.* BANNISTER AND ANOTHER.

[1930. B. 1182.]

Vendor and Purchaser—Lessor and Lessee—Dangerous Condition of Hereditament or Tenement—Injury to Purchaser or Tenant—Duty of Vendor or Lessor—Boiler and Gas Burner—Negligence—Fatal Accidents Act, 1846 (9 *&* 10 *Vict. c.* 93).

At common law in the absence of express contract a landlord of an unfurnished house is not liable to his tenant, nor is a vendor of real estate liable to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, even if the defects are due to his construction or are within his knowledge.

Robbins v. *Jones* (1863) 15 C. B. (N. S.) 221, *Lane* v. *Cox* [1897] 1 Q. B. 415, and *Cavalier* v. *Pope* [1906] A. C. 428, followed.

A firm of builders, having built several houses on an estate of which they were the owners, sold to one C. B. a house which was nearly completed. They agreed to complete the house by the end of October, 1929, and to make it fit for habitation, and like in decoration and design to the other houses on the estate. The agreement contained a clause enabling C. B. to go into possession before completion as tenant at will. The house, like the others on the estate, was fitted with a particular make of boiler, which was placed in the kitchen and was heated by a Bunsen gas burner. Above the kitchen was a bathroom. From a cupboard in the bathroom a linen chute ran down to a cupboard in the kitchen connected with the boiler by a pipe. There was no flue to carry gas or fumes from the burner to the outward air. C. B. with his wife and child went into occupation on September 28. The C. Gas Company's inspector examined the gas fittings and set the regulator fitted to the burner so that 45 cubic feet of gas and no more passed into the burner per hour. On October 26, C. B. and his wife were found dead in the bathroom, poisoned by carbon monoxide gas. A few days afterwards the regulator was found so set that much more than 45 cubic feet could pass into the burner in an hour. The boiler with its burner and the linen chute were parts of the realty. The boiler with the burner properly regulated was not dangerous. It was the business of the Gas Company and not that of the builders to regulate the flow of gas to the burner.

In an action under the Fatal Accidents Act, 1846, by the administrators of C. B. and his wife against the builders:—

Held, that there was no evidence of a breach of any duty which the law cast upon the defendants as vendors or lessors of the house towards C. B. or his wife, and that the plaintiffs could not recover.

Judgment of Hawke J. at trial with a jury reversed.

APPEAL from the judgment of Hawke J. in an action tried before the learned judge and a common jury.

The action was brought under the Fatal Accidents Act, 1846, by the plaintiffs, administrators of Charles Henry Bottomley and Enid Bottomley, his wife, for the benefit of Mary Renee Bottomley, aged eighteen months, who had suffered damage from the alleged negligence of the defendants which caused the death of her parents the said C. H. Bottomley and E. Bottomley on October 26, 1929.

The defendants, George William Bannister and Walter Harris, were builders carrying on business at Streatham.

By an agreement in writing dated September 27, 1929, and made between the defendants (therein called "the vendors"), and Charles Henry Bottomley (therein called "the purchaser"), the vendors agreed to sell and the purchaser to purchase for 1025*l.* a piece of land in Denmark Road, Carshalton, together with a house and garage, No. 35 Denmark Road. By clause 7 of the agreement the purchase was to be completed on October 31, 1929. The agreement also contained the following clauses :—

Clause 9. "The vendors will prior to completion complete and render fit for habitation to the reasonable satisfaction of the purchaser the messuage referred to in the First Schedule hereto"—the house mentioned above—"the same to be similar in decoration and design to those already erected on the vendors' Denmark Road estate" . . . .

Clause 10. "The purchaser shall be at liberty at any time before the actual completion of the purchase to take possession of the premises hereby contracted to be sold and this shall not be deemed an acceptance of the title . . . . and shall not prejudice the rights of either party under this agreement or otherwise vary the conditions thereof. If the purchaser takes possession under this clause he shall hold the premises as tenant at will until the purchase is completed."

In accordance with the terms of clause 10 of this agreement Charles Henry Bottomley and Enid Bottomley went into possession of the house on September 28, 1929. On October 26, 1929, they were both found dead in the bathroom of the house, having been poisoned by carbon monoxide gas.

The plaintiffs alleged that the defendants impliedly and within the meaning of clause 9 of the contract undertook to complete the house and its bathroom and the apparatus for heating water and the plumbing work in connection therewith in a proper and workmanlike manner; and that in breach of their duty and of the contract they had neglected to complete the house; that the house was not fit for habitation but was dangerous to inmates by reason of a gas burner and water heater not being fitted with a flue, whereby poisonous gases were allowed to accumulate in the house, and that the defendants ought to have known of this defect and ought to have warned the purchaser or any other inmate of its existence.

The defendants denied that Charles Henry Bottomley was in occupation of the house otherwise than as a tenant at will under clause 10 of the contract. They denied that they owed any duty to Enid Bottomley either by contract or otherwise. They also denied that they had failed to complete the house in a proper and workmanlike manner; or that it was unfit for habitation or dangerous or that the gas burner was negligently installed. They admitted that the burner was not fitted with a flue, but denied that they were under any duty to provide a flue, and denied that they knew or ought to have known that the burner was dangerous or that they were under any duty to warn Charles Henry Bottomley of the absence of a flue. They further pleaded that on October 26 their obligation to complete the house and render it fit for habitation had not arisen.

The following facts appeared from the evidence: No. 35 Denmark Road, and all the houses erected at the date of the agreement on the defendants' Denmark Road estate, were fitted with what is known as a Halliday boiler, an article manufactured by a company named Halliday Boilers, Ld., of Saxon Road, London, S.E., and supplied by them for the purpose of heating water. The company issued a brochure containing a description with illustrations of the boiler and stating, among its "outstanding features," that: "As no pressure is generated, there is no danger of explosion either by steam or gas, and as the special burner gives absolutely perfect combustion, no noxious fumes are generated." The burner was a Bunsen burner fitted with a needle regulating the flow of gas from the connecting pipe to the burner. The brochure also contained the following statement: "If desired, a baffle hood can be fitted above top of boiler, and connect through external wall, as shown in illustration, or piping can be carried through top of window, into a chimney, or into a loft above bathroom." No such appliance had been asked for or supplied in the present case, nor any flue to carry noxious fumes or vapours into the open air.

The Halliday boiler was fixed in the kitchen. A pipe from the boiler led into an enclosed wooden cupboard in the kitchen. From this cupboard a linen chute led upwards to another cupboard in the bathroom above the kitchen closed by a movable hatch. The bathroom had a window with a fanlight over it. The kitchen had a window door opening to the outside air. The Croydon Gas Company supplied gas to the houses in Denmark Road. Before any gas was supplied the company's inspector had to examine the fittings and to satisfy himself that they were satisfactory, and the gas appliances set and working properly, and the burner registering a supply of 45 cubic feet of gas per hour and no more. This work was duly done by the Gas Company's inspector on September 28, 1929. Three or four days after October 26 an official from the Gas Company found that the needle as then set allowed much more gas than this to pass through the burner. Some 1500 of these boilers had been sold to various purchasers without mishap, and the Aerated Bread Company had 500 of them in use in their kitchens and had chosen them because they did not require flues; but it appeared that these kitchens were not closed with doors and that air could therefore circulate the more freely in them.

Upon the question of the defendants' liability the learned judge at the trial put three questions to the jury, which, with the answers of the jury, were as follows:—

1. Did the carbon monoxide which caused the deaths come from the apparatus in question? Yes.

2. Was the apparatus in question when used as installed by the defendants—

(*a*) without a flue—

(*b*) in connection with the chute to the bathroom—dangerous for use? Answer, Yes (to both limbs of the question).

3. If yea, did the defendants (*a*) know, or (*b*) ought they to have known, that it was dangerous? Answers: to (*a*) No; to (*b*) Yes.

They assessed the damages at 1700*l.*

On these findings the learned judge gave judgment for the plaintiffs for 1700*l.*

The defendants appealed.

Montgomery K.C. and *Cremlyn* for the appellants. This being an action under the Fatal Accidents Act, 1846, the liability, if any, of the defendants must sound in tort and not in contract. There was no evidence to support the finding of the jury in answer to the second question. The apparatus as installed by the appellants was not dangerous for use, unless it is to be said that all use of gas is dangerous. As regulated by the Gas Company's inspector it was perfectly harmless. It was only when the regulator was interfered with that it became dangerous; but for the acts or interference of others the appellants are not responsible, unless the thing interfered with is dangerous in itself, which, in face of the evidence of witnesses from the Aerated Bread Company, cannot be said of the Halliday boiler. It is not suggested that the Gas Company's inspector was in any way negligent; and if it was, he was not acting as the agent of the appellants. Still less are the appellants liable if, as is most probable, the regulator was interfered with by the deceased man or his wife. But even if the apparatus as installed by the appellants was dangerous in itself, the answer of the jury to the first part of question 3—namely, that the appellants did not know it was dangerous, acquits them from any obligation to warn their tenants; they cannot be expected to give warning of that which they do not know.

2. The second part of question 3 was out of place and ought not to have been put to the jury at all. It would be appropriate in a case of an occupier of business premises who invites customers to resort to his shop or warehouse for purposes connected with the business; he may be liable to the invitees for damage from dangers which he ought to have known of. But it is well settled law that no such liability is imposed by law upon a vendor or lessor of real property: *Sutton* v. *Temple* (1); *Hart* v. *Windsor* (2); *Robbins* v. *Jones* (3); *Lane* v. *Cox* (4); *Cavalier* v. *Pope*. (5) In these cases the rule is caveat emptor: *Erskine* v. *Adeane* (6), per Mellish L.J.; *Cheater* v. *Cater*. (7)

Eastham K.C. and *Frank J. Powell* for the respondents. Besides being vendors or lessors the appellants were builders engaged in building a house for the habitation of Mr. Bottomley and his family. In their character as builders they incurred a liability which in its nature and essence is a liability in tort, the contract being merely matter of inducement indicating or colouring a relation which the law itself invests

(1) (1843) 12 M. & W. 52.
(2) (1844) 12 M. & W. 68, 87.
(3) (1863) 15 C. B. (N. S.) 221.
(4) [1897] 1 Q. B. 415.
(5) [1906] A. C. 428.
(6) (1873) L. R. 8 Ch. 756, 761.
(7) [1918] 1 K. B. 247.

with rights and duties. These rights and duties have in later days come to be described as arising out of implied contract, but as a matter of history they were well recognized when as yet an action on a simple contract did not lie at common law. A builder who commenced operations on a house and in the process of building committed an act of misfeasance was liable in an action on the case when he could not have been sued upon the building contract unless it was under seal. (1) This liability in tort still remains. If a builder should leave an explosive or a quantity of corrosive acid in the house he would not, it is submitted, escape liability because he let the house to a tenant with that element of danger upon it. If this is right, the question is whether this gas apparatus was dangerous for use. The jury have found that it was. In view of *Parry* v. *Smith* (2) and *Dominion Natural Gas Co.* v. *Collins* (3) it cannot be said that there was no ground for their verdict.

Then there having been an initial act of misfeasance rendering the house dangerous, and no warning given to those who are likely to be exposed to the danger, the appellants who created it are liable: *Dixon* v. *Bell* (4); *George* v. *Skivington* (5); *Heaven* v. *Pender* (6); *Blacker* v. *Lake & Elliot, Ld.* (7); *White* v. *Steadman.* (8)

[*Lawrence* v. *Cassel* (9) was also cited.]

Cremlyn in reply.

Cur. adv. vult.

Oct. 26. The following written judgments were delivered:—

SCRUTTON L.J. This is an action brought under Lord Campbell's Act by the administrators of the estate of Charles Henry Bottomley and Enid Bottomley, his wife, both deceased, for the benefit of their infant child, against a firm of builders. On somewhat unusual facts it raised difficult questions of law and the questions which were asked, and which were not asked, of the jury and their answers did not make the solution of the questions easier.

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(1) Many instances occur in the Year Books; see for example (1409) Mich. 11 Hen. 4, fol. 33, pl. 60; (1425) Hil. 3 Hen. 6, fol. 36, pl. 33, especially per Martin J.

(2) (1879) 4 C. P. D. 325.

(3) [1909] A. C. 640.

(4) (1816) 5 M. & S. 198.

(5) (1869) L. R. 5 Ex. 1.

(6) (1883) 11 Q. B. D. 503.

(7) (1912) 106 L. T. 533.

(8) [1913] 3 K. B. 340.

(9) [1930] 2 K. B. 83.

The defendants were builders on a building estate and had already built a number of houses to the same design, some of which were already occupied. On September 29, 1929, they entered into an agreement for the sale of one of these houses, then practically completed, to C. H. Bottomley. Under that agreement completion was to take place on October 31, afterwards advanced to October 28. Under a clause in the agreement Bottomley was at liberty to take possession before completion as a tenant at will. This was not to prejudice the rights of either party under the agreement. Clause 9 of the agreement ran: "The vendors will prior to completion complete and render fit for habitation to the reasonable satisfaction of the purchaser the said messuage or dwelling-house, the same to be similar in decoration and design to those already erected on the vendors' Denmark Road estate." On September 28 Bottomley his wife and infant child went into possession. They appear to have had no servant. One of the features of the design of all the houses that the defendants were building was that hot water for the bath and sink was provided by a Halliday boiler heated by a Bunsen gas burner, with no flue to carry off waste products, if any, to the outer air. It was in evidence that some 15,000 of these boilers had been sold. It was also proved that the Aerated Bread Company used over 500 of these boilers in the small kitchens of their various shops; that this company selected them because they needed no flues, which it would often be expensive to construct in their shops; that no difficulty had occurred with them, though without flues, and that they were still being fixed at the time of the trial. The amount of gas used could be regulated by a needle, and the Halliday Company advised that it should not exceed 55 cubic feet an hour. The reason for no flue being fitted was given in the statements in the Halliday Company's prospectus: "As the special burner gives absolutely perfect combustion no noxious fumes are generated" . . . . "The special gas burner which gives complete combustion." Besides this element of design, a Halliday boiler fixed in the kitchen with no flue, there was also a labour-saving device in the construction of the house—namely, that from the bathroom over the kitchen a linen chute ran to the kitchen. It began in an enclosed wooden cupboard in the bathroom, was closed on that floor by a movable hatch, and finished in an enclosed wooden cupboard in the kitchen. The bathroom had a window with fanlight over it. The kitchen had a door and a window-door into the open air. On September 28 the Croydon Gas Company's inspector came to test the gas fittings before the Gas Company supplied gas to the occupier, Mr. Bottomley. He "had to satisfy himself that the fittings were satisfactory and gas appliances set and working properly and burner rated as working 45 feet per hour." It was so rated at the Gas Company's standard pressure. "He had to see it was rated correctly." On that day the Bottomleys went into possession, and the kitchen and presumably the Halliday boiler must have been continuously used for the next four weeks. The Halliday boiler was being used in the other houses on the estate without any ill effects. But on the morning of October 26, the husband and wife were found dead in the bathroom, undoubtedly killed by carbon monoxide gas which had come from the Bunsen burner of the Halliday boiler. Unfortunately there was no precise evidence as to the adjustment of the needle of the burner at that time, except that the gas manager, who apparently examined it three or four days afterwards, said that "it was passing far too much gas." But when scientifically tested in June, 1930, the house having been empty meanwhile, it was found to be set at 75 feet per hour, as against 45 feet on September 28, 1929.

After prolonged discussion about questions the jury were asked and answered as follows: "(Q.) Did the carbon monoxide which caused the deaths come from the apparatus in question? (A.) Yes. (Q.) Was the apparatus in question when used as installed by the defendants (*a*) without a flue; (*b*) in connection with the chute to the bathroom, dangerous for use? (A.) Yes." Then, "If yea, did the defendants (*a*) know, or (*b*) ought they to have known, that it was dangerous," and they answered the first question that the defendants did not know. They answered the second question that they ought to have known. Damages 1700*l*. After a discussion about the law, Hawke J. held that the findings of the jury meant that there was a dangerous thing, and the defendants were negligent in dealing with it, and in not adopting devices for keeping the dangerous thing safe. It will be noticed that the "dangerous thing" was apparently "the apparatus when used with gas as installed," though the death was caused after the installed rate of flow of gas had apparently been altered. When installed by the defendants the Gas Company had not regulated it. After the Company on behalf of the occupier, to whom they were going to supply gas, set the regulator at 45 feet per hour, there was no evidence that so regulated it was dangerous. There was no evidence that the defendants had anything to do with its regulation or alteration. The probability is almost overwhelming that the dead man or his wife altered the regulator to a dangerous position after the Gas Company's inspector had regulated it safely. No question was asked whether the house was fit for habitation on September 28. It was apparently admitted that the house was similar in design to the defendants' other houses, in which no difficulty had occurred. No question was asked whether the defendants were guilty of negligence, nor except as above stated was there any direction as to the defendants' duty, of which negligence would be a breach. No question was asked about the alteration of the needle, though it can hardly have been altered by any one but the tenant or his wife. The judgment seems rather to have been put on tort in dealing with a dangerous thing giving a cause of action to any one who was injured by a dangerous thing against the seller or person responsible for the creation of a dangerous thing, than on contract. The wife had no contract, but must sue in tort; the husband would sue either in tort or contract: the child could not recover unless her father or mother, or both, when alive and injured, could have sued.

I deal with the facts as conclusively establishing: (1.) that the boiler, burner and linen chute were parts of the realty; (2.) that in view of the evidence from the Aerated Bread Company such an installation properly regulated was not dangerous; (3.) that the defendants had nothing to do with the regulation, which, as established by the Gas Company's inspector for the occupier at 45 feet, was perfectly safe; (4.) that the alteration to 75 feet, which was dangerous, was the act of the occupier or his wife. The unfortunate question, "when used as installed by the defendants," completely ignores facts (3.) and (4.). There was, in my opinion, no evidence on which the jury could make findings inconsistent with the above four facts.

At the time of the death Mr. Bottomley was a purchaser of real estate and a tenant at will of a house. The Halliday boiler connected with gas pipes was, in my opinion, a part of the realty and of the house which the tenant could not remove: *Sewell* v. *Angerstein* (1); *Smith* v. *Maclure* (2); Foa, Law of Landlord and Tenant, 6th ed. (1924), pp. 768, 780; Woodfall, Law of Landlord and Tenant, 22nd ed. (1928), p. 796.

Now it is at present well established English law that, in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant, or a vendor of real estate to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, even if he has constructed the defects himself or is aware of their existence. Parliament has altered this general law, by imposing by s. 1 of the Housing Act, 1925, an implied warranty of fitness in the case of small houses, the definition of which does not include the present house. As to the general law, see Parke B. in *Hart* v. *Windsor* (3): "There is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let. The principles of the common law do not warrant such a position." Erle C.J. in

(1) (1868) 18 L. T. (N. S.) 300.
(2) (1884) 32 W. R. 459.
(3) 12 M. & W. 68, 87.

Robbins v. *Jones* (1), in a judgment written by Willes J. (2), says: "Fraud apart, there is no law against letting a tumbledown house." The headnote of *Lane* v. *Cox* (3), a decision of the Court of Appeal, is: "A landlord who lets an unfurnished house in a dangerous condition, he being under no liability to keep it in repair, is not liable to his tenant, or to a person using the premises, for personal injuries happening during the term, and due to the defective state of the house." In *Sutton* v. *Temple* (4), it was held that in a lease of land for grazing there was no implied contract that the land was fit for that purpose, it being in fact poisoned by heaps of refuse paint. Whether the law might be otherwise is a matter for consideration of Parliament; this Court is bound by well-established law.

But there is a contract in this case which, as the case of *Lawrence* v. *Cassel* (5) shows, may add some obligation to the lease or conveyance. By para. 9 of that agreement the defendants are prior to completion, that is before October 28, (1.) to complete the messuage sold to be similar in decoration and design to those already erected on the vendors' Denmark Road Estate. I am of opinion that "design" covers the Halliday boiler without flue and in connection with the linen chute which is the design of the houses already erected; (2.) the house is to be "fit for habitation." No question on this was left to the jury, but in view of the evidence as to the other houses and to the kitchens of the Aerated Bread Company and of the month's residence in this house, I can see no evidence on which the jury could find that the house with the needle of the Halliday boiler properly regulated was not "fit for habitation." There was therefore in my opinion no breach of contract.

There remained a claim in tort based on the cases which consider the circumstances under which a person in control of a dangerous thing is liable to persons with whom he has no contract. They have often been discussed. Lord Sumner, then

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(1) 15 C. B. (N. S.) 221, 240.

(2) See 15 C. B. (N. S.) 223.

(3) [1897] 1 Q. B. 415.

(4) 12 M. & W. 52.

(5) [1930] 2 K. B. 83.

Hamilton J., dealt with them at length in *Blacker* v. *Lake & Elliot, Ld.* (1), where he held that the question whether an article was dangerous per se was a question of law for the judge, not a question of fact for the jury. I had a similar question to consider in the cases of *Hodge & Willmott* v. *Anglo-American Oil Co.* (2) I do not repeat that judgment, but I stated the law thus (3): "The law, therefore, seems to be: (1.) that if the barge which has carried petrol is an article dangerous in itself, it is the duty of the owners to take proper and reasonable precautions to prevent its doing damage to people likely to come into contact with it. These precautions may be fulfilled by entrusting it to a competent person with reasonable warning of its dangerous character, if that danger is not obvious. If such precautions are not taken, the owner will be liable to third persons with whom he has no contract for damage done by the barge, which they could not have avoided with reasonable care. (2.) If the barge which has carried petrol is not dangerous in itself, but becomes dangerous because it has been insufficiently cleaned, and the owner is ignorant of the danger, the owner is not liable for damage caused by it to persons with whom he has no contract: *Earl* v. *Lubbock* (4)," a decision of this Court. "(3.) In the case of a thing dangerous in itself, where either the danger is obvious or the owner has given proper warning to the person entrusted with it, not being his servant, the owner is not liable for negligence of such person causing injury to a third party; such negligence is nova causa interveniens." But these are all cases relating to chattels, and appear to me not to apply to real property or fixtures forming part of houses. The plaintiff's case was rested in argument on such cases as *Parry* v. *Smith* (5), where a gas fitter left a leaky gas pipe on premises where he was altering the gas fittings and was held liable in tort to a servant of the occupier. It is not very clear in the present case whether the "dangerous thing per se" is said to be "gas" or, as the judge put it in his question to the jury, "the apparatus in question when used as installed by the defendants without a flue" and with a linen chute. If "gas" is meant, all gas is dangerous if the occupier leaves the tap on. If "gas as installed" is meant, the installation was regulated by the Gas Company, independent contractors with the occupier, and not with the vendor or landlord. In my opinion there is no evidence on which the boiler "when used as installed by the defendants" could be said to be dangerous. Properly regulated at 45 feet per hour I see no evidence of danger. It seems a great stretch of imagination to say that the 500 boilers of the Aerated Bread Company's kitchens, working without flues in small kitchens without any bad results, are dangerous. They probably are dangerous if not properly regulated. But in the present case the boiler was regulated by the Gas Company's inspector, for whom the defendants were not liable. It is suggested that the standard pressure at which he regulated it might vary so as to alter the regulation. This was not critically examined, but I cannot believe that the standard pressure would vary so as to increase to one and two-thirds of the normal pressure, forty-five feet to seventy-five feet. Anyhow the defendants had nothing to do with the Gas Company's variation of its pressure. The Company was supplying gas to the tenant or purchaser, not to the landlord. If the inspector regulated the gas wrongly the defendants would not be liable. It is not suggested, nor can one see any reason why the defendants should alter the regulator. It is obvious in my opinion that the regulator was altered by the tenant or his wife, and for this the defendants could not be liable. The jury have found that the defendants did not know of the danger, and I can see no evidence to justify their finding that the defendants ought to have known. The gas inspector after regulating it passed the appliance. Ought he to have known it was dangerous as regulated? In my opinion the appliance properly regulated was not dangerous; its danger would come from improper regulation by the tenant or purchaser, and as the vendor-landlord did not know of the danger he

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(1) 106 L. T. 533.

(2) (1922) 12 Ll. L. Rep. 183.

(3) 12 Ll. L. Rep. 188.

(4) [1905] 1 K. B. 253.

(5) 4 C. P. D. 325.

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could not warn. The above remarks are on the assumption that the appliance is to be treated as a chattel. But as in my opinion it was part of the realty, and as it was not dangerous if properly regulated and the vendor-landlord did not know of its danger if improperly regulated, he was under no liability to the purchaser-tenant. The plaintiffs relied strongly on the judgment of the Privy Council in the *Dominion Gas* case. (1) The facts in that case were quite unlike those in the present case. The damage there was caused by the ignition of natural gas in a very peculiar machine. The gas fitters were found by the jury to have been negligent in not fitting a flue. In view of the evidence as to the kitchens of the Aerated Bread Company the defendants, who did not know of any danger, could not in my opinion be found negligent in this respect, and the jury were not asked the question. The language of Lord Dunedin in the Canadian case has been frequently criticized: see Salmond on Torts, 7th ed., p. 478, note (*b*), and my judgment in *Hodge* v. *Anglo-American Oil Co.* (2), where I said: "There remains the further question how far in the case of a thing dangerous in itself, the fact that the damage was occasioned by the act of a third party in connection with the dangerous thing is a defence open to the original supplier. This appears to me to turn on the extent of the knowledge of, or warning given to, the third party. In *Dixon* v. *Bell* (3) a loaded gun was sent for by the owner, and, the priming having been removed by his instructions, was given to 'a mulatto girl, his servant, of the age of about thirteen or fourteen,' who loitered on the way and 'presented it in play at the plaintiff's son . . . . and drew the trigger.' The owner of the gun was held liable. But if the gun had been given with warning of its condition to a person of full age and intelligence, I find it difficult to think that his act would not be a nova causa interveniens so as to relieve the owner. His duty is to give adequate warning of danger, as if he sells poison so labelled to an intelligent adult. I do not quite understand Lord Dunedin's remark in *Dominion Natural Gas Co.* v. *Collins* (1), where he says: 'The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. . . . On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable.'" I go on to say: "It is not quite clear what is the distinction between the other agency, which is no excuse, and the conscious act of volition, which is an excuse. Probably the owner fulfils his duty if he entrusts the dangerous thing to a competent person who knows or is warned of the danger. I think that if the danger is caused by: (1.) the negligence of the defendant in handing without warning a dangerous thing to a third party; (2.) the act of that third party in dealing reasonably with the thing, in ignorance of its dangerous character, the defendant would not be excused. If, however, the defendant hands the dangerous thing, with warning of its character, on to a competent person who knows of its character, though neither the warning nor the knowledge is of the exact amount of the danger, I do not think the defendant is liable to third parties for the action of the receiver, which is unreasonable in view of this knowledge or warning. His action is, I think, nova causa interveniens. For instance, if a chemist sells to a man of full age a substance labelled poison, he cannot be liable to a third party for the action of that man in spreading it on bread and butter, whereby the third party is injured; or to take Mr. Hastings' illustration, if I give a gun to a gunsmith for extraction of a jammed cartridge, telling him of the danger, I cannot be liable to a third party, say his workman, for damages caused by the gunsmith's negligent extraction of the cartridge."

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(1) [1909] A. C. 640.

(2) 12 Ll. L. Rep. 187.

(3) 5 M. & S. 198. [Lord Ellenborough C.J. himself thought this a hard case; but he and Bayley J. agreed that the owner of the gun ought to have put it "out of all reach of doing harm." In *Longmeid* v. *Holliday* (1851) 6 Ex. 761, 768, Parke B. calls it a very strong case.—F. P.]

In the present case, assuming the defendants have installed a chattel which if used with gas and if not properly regulated will be dangerous, the defendants knew that before the Gas Company will supply gas they, being competent people, will test and regulate the chattel so as to render it not dangerous. My view of the law is that the installation being part of the realty, the cases as to chattels do not apply; and that if the installation is treated as a chattel it is a chattel handed to a competent person to regulate on behalf of the tenant-occupier, and the vendor-landlord is not liable for what happens afterwards.

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(1) [1909] A. C. 640, 646.

In my opinion the judgment appealed from should be set aside and judgment entered for the defendants with costs here and below. I can understand that the jury sympathized with the little baby, but their sympathy must not be allowed to do an injustice to the defendants.

GREER L.J. In my opinion this appeal ought to be allowed, and judgment entered for the defendants with costs here and below.

The action was brought by the administrators of the late Charles Henry Bottomley and Enid Bottomley, his wife, to recover the pecuniary loss sustained by Mary Renee Bottomley, the only child of the said C. H. Bottomley and Enid Bottomley, through the death of her parents, which the plaintiffs allege was caused by the negligence of the defendants. The facts of the case are peculiar, and if, as I think, the plaintiffs are in the present state of the law without remedy, the matter might well be worthy of consideration by the Legislature.

The defendants are building contractors who had acquired certain land in Carshalton, Surrey, and were in the course of developing it as a building estate. After they had built several houses on the land, they entered into a contract dated September 27, 1929, to sell one of them, to be known as 35 Denmark Road, to Mr. Bottomley. The contract provided that the date of completion should be October 28, afterwards altered to October 30, 1929. By clause 9 it was provided that the vendors would prior to completion complete and render fit for habitation to the reasonable satisfaction of the purchaser the said messuage or dwelling-house, the same to be similar in decoration and design to those already erected on the vendors' Denmark Road estate, and by clause 10, that the purchaser should be at liberty at any time prior to the actual completion of the purchase to take possession of the premises thereby contracted to be sold, and if he did so he should hold the premises as tenant at will until the purchase was completed. The day after the agreement Mr. Bottomley entered into possession with his wife and daughter, and pending completion held the premises as tenant at will. In all the houses then built on the said estate a fixture for heating the bath water, known as the Halliday boiler, had been fixed in the kitchens in a certain position immediately below the bathroom. One was so fixed in the house in question when the Bottomleys took possession. There was an enclosed cupboard in the kitchen which ascended to the bathroom floor, in a corner of which there was also an enclosed cupboard. The connection between the kitchen and the bathroom is not quite clear, but is described in the evidence as a chute, and it was alleged that carbon monoxide escaped through this chute from the Halliday boiler and got into the bathroom. Attached to the boiler there was a needle which was intended to regulate the pressure of gas, and it was fixed so that the pressure ought not to have exceeded 45; but somehow or other on October 26 carbon monoxide seems to have been produced under excessive pressure and to have escaped through the chute into the bathroom when either Mr. or Mrs. Bottomley was engaged in having a bath, and they were both found dead in the bathroom.

Certain questions were submitted to the jury at the trial, which they answered as follows: "(1.) Did the carbon monoxide which caused the deaths come from the apparatus in question? Yes. (2.) Was the apparatus in question when used as installed by the defendants (*a*) without a flue, (*b*) in connection with the chute to the bathroom, dangerous for use? Yes. (3.) If yea, did the defendants know? No. Or ought they to have known? Yes; that it was dangerous. Damages 1700*l.*" No question was expressly asked of the jury whether in installing the apparatus the defendants had been guilty of negligence, nor was any question asked whether the deaths were the result of that negligence. The absence of the question whether the deaths were the result of the negligence is important, because the defendants desired to have the jury's finding on the question whether the escape of the poisonous gas might not have been caused by some one having tampered with the apparatus as originally fixed. Be this as it may, the important question for determination is whether it was established that there was any breach of duty by the defendants towards the plaintiffs. Does the vendor or lessor of a house owe any duty, independently of contract, to persons who may happen to come to live in the house either by purchase from him, or as his tenants, to exercise reasonable care to see that the house is fit for occupation ? It is a commonplace of the law of negligence that before you can establish liability for negligence you must first show that the law recognizes some duty towards the person who puts forward the claim. The plaintiffs in this action alleged that the defendants were guilty of a negligent breach of duty towards the deceased in that they failed to attach to the Halliday boiler a flue to carry off the poisonous fumes through the wall into the open air. When the defendants installed the boiler they had not then and might never have had any relations with the deceased. English law does not recognize a duty in the air, so to speak; that is, a duty to undertake that no one shall suffer from one's carelessness. The customer owes a duty to his bank to draw his cheques carefully so that it will be difficult for any holder fraudulently to alter them, but he owes no such duty to every person into whose hands the cheques may come : *Scholfield* v. *Earl of Londesborough*. (1) A corporation may owe a duty to itself or its shareholders to take good care of its seal, but people who rely on its seal having been carefully used do not obtain any rights thereby, however negligent the corporation may have been with regard to its custody : *Bank of Ireland* v. *Evans' Charities*. (2) It seems to me that

(1) [1896] A. C. 514.

(2) (1855) 5 H. L. C. 389.

this principle equally applies to the case of a builder or other owner of property, when the question is whether he owes any duty towards people who may with his consent either as purchasers, tenants, or licensees of purchasers or tenants, come on to his property and be damaged by its defective condition. The law is stated by Lord Atkinson in *Cavalier* v. *Pope* (1), where he says: "It is well established that no duty is, at law, cast upon a landlord not to let a house in a dangerous or dilapidated condition, and further, that if he does let it while in such a condition, he is not thereby rendered liable in damages for injuries which may be sustained by the tenant, his (the tenant's) servants, guests, customers, or others invited by him to enter the premises by reason of this defective condition: *Robbins* v. *Jones* (2); *Lane* v. *Cox*." (3) A purchaser of the freehold is, in my judgment, in no better position than a tenant. No case was cited to us in which a tenant or purchaser has ever recovered against a lessor or vendor, either by implied contract or in tort, by establishing the liability of the vendor or landlord for injuries sustained through the house or its fixtures being unsafe at the date of the sale or of the lease.

It was strenuously contended by Mr. Eastham on behalf of the respondents that they were entitled to retain the judgment by reason of the principles involved in two classes of decisions. First, the cases concerned with the liability of a contractor doing work negligently on another person's premises to people with whom he had no contractual relations who were damaged by reason of his defective work. Such cases are *Parry* v. *Smith* (4); *Dominion Natural Gas Co.* v. *Collins* (5); and *Heaven* v. *Pender*. (6) The other cases are those which deal with the liability of a vendor of some chattel, which is dangerous in itself, who gives no warning to the purchaser which might be passed on to the user of the article. After *Cavalier* v. *Pope* (7) in the House of Lords, and *Lane* v. *Cox* (3), I cannot hold that these

(1) [1906] A. C. 428, 432.
(2) 15 C. B. (N. S.) 221.
(3) [1897] 1 Q. B. 415.
(4) 4 C. P. D. 325.
(5) [1909] A. C. 640.
(6) 11 Q. B. D. 503.
(7) [1906] A. C. 428.

decisions apply to cases between landlord and tenant, or to cases between the landlord and persons using the premises by licence of the tenant. The result is unsatisfactory, because in the present case, if the landlord instead of doing the work himself before he sold the house, had done it afterwards as a contractor to Mr. Bottomley, he would have been liable if there were sufficient evidence that it was negligence on his part to have installed the Halliday boiler without a flue. Even if the cases about contractors applied to the facts of the present case, I should have hesitated to hold on facts proved at the trial that there was any evidence of want of reasonable care in installing the apparatus without a flue. Similar apparatus without a flue had been installed in 500 or 600 kitchens of the Aerated Bread Company without having untoward results. Similar apparatus had been similarly installed in the defendants' other houses on the land in question without any complaint having been received, or any damage having been incurred. The mere fact that the Gas Company's official thought it was better to provide a flue would not in my judgment afford sufficient evidence to enable a jury to say that the defendant was negligent because he did not hold a similar view. Be this as it may, so far as Mr. Bottomley is concerned we have to deal with the case of a man who had expressly agreed to purchase, and for the time being to become tenant of, a house similar in design to those already erected. He therefore took the risk of purchasing the premises in their actual condition.

With regard to the other class of cases, it is not easy to reconcile all the decisions on the subject. I agree with the view expressed by Scrutton L.J. in *Hodge* v. *Anglo-American Oil Co.* (1): "If a person negligently puts in circulation a thing in fact dangerous, the state of the authorities in England is not very satisfactory as regards his liability towards a third person with whom he has no contract, but who is a member of a class who might reasonably be expected to use the dangerous thing, and to suffer damage from its condition if not warned of it; and this unsatisfactory condition can only, in my opinion, be dealt with satisfactorily by the House of Lords. When a thing is safe if properly constructed, but owing to negligent construction is in fact dangerous to those who may be expected to use it, *Earl* v. *Lubbock* (1), a decision of this Court binding us, decides that the repairer or constructor is under no liability to a person whom he might reasonably expect to use it, but with whom he has no contract. A similar result was arrived at by the House in *Caledonian Ry. Co.* v. *Mulholland.* (2) On this principle have been decided *Winterbottom* v. *Wright* (3); *Blacker* v. *Lake & Elliot, Ld.* (4); and *Bates* v. *Batey & Co., Ld.* (5) *Cavalier* v. *Pope* (6), though it can be based on the plaintiff's knowledge of the danger, seems also to involve the same principle. It is expressed by Parke B. in *Longmeid* v. *Holliday* (7) in these words: ' And it may be the same when anyone delivers to another without notice an instrument in its nature dangerous, or under particular circumstances, as a loaded gun which he himself loaded, and that other person to whom it is delivered is injured thereby, or if he places it in a situation easily accessible to a third person, who sustains damage from it. A very strong case to that effect is *Dixon* v. *Bell.* (8) But it would be going much too far to say, that so much care is required in the ordinary intercourse of life between one individual and another, that, if a machine not in its nature dangerous, —a carriage for instance,—but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it,' where he is in the latter portion of his remarks, dealing with a thing in fact dangerous but not known to be dangerous by the supplier. The existence of this line of cases summarized in *Earl* v. *Lubbock* (1), a decision of this Court, prevents this Court from adopting in all cases the principle adopted by many American Courts, that a person who puts in circulation a thing in fact dangerous with a misleading statement as to its danger, or without warning as to its danger, is liable to all persons into whose hands it subsequently comes and whom it damages, whether he has a contract with them or not, on the ground that he owes a duty to any person who may be reasonably expected to use it." It would serve no useful purpose to go through the various decisions in detail, but in my judgment it has not yet been decided by any authority binding on this Court that a person selling an article which he did not know to be dangerous can be held liable to a person with whom he has made no contract, by reason of the fact that reasonable inquiries might have enabled him to discover that the article was in fact dangerous. As pointed out by Hamilton J. in *Blacker* v. *Lake & Elliot, Ld.* (1), the question whether an article belongs to a dangerous class is, when there is no dispute of fact as to the nature of the article, a question of law for the judge. In my judgment, the judge in the present case ought to have held the Halliday boiler without a flue not to be an article dangerous per se. It would admittedly have been quite safe if the needle had remained as fixed, and there had been no exceptional pressure from the gas mains. If it be a defect in the Halliday boiler that it had no flue, that was a defect which was just as ascertainable by the deceased as by the defendants.

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(1) 12 Ll. L. Rep. 183, 186.

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(1) [1905] 1 K. B. 253.
(2) [1898] A. C. 216.
(3) (1842) 10 M. & W. 109.
(4) 106 L. T. 533.
(5) [1913] 3 K. B. 351.
(6) [1906] A. C. 428.
(7) 6 Ex. 761, 767.
(8) 5 M. & S. 198.

As this action was based on tort, and not on a breach of a contract, it is unnecessary to consider any claim for breach of clause 9 of the contract. A breach of contract resulting in damage to the estate of the deceased gives a cause of action to the representatives independently of the Fatal Accidents Act. That Act only operates to create a cause of action which did not exist before the Act was passed. There was no evidence that Mr. Bottomley was reasonably or at all dissatisfied with the condition of the premises. Further, inasmuch as the date of completion had not arrived

(1) 106 L. T. 533, 535.

when Mr. and Mrs. Bottomley met their death, it could not be said that the death was due to a breach of clause 9 of the contract, inasmuch as the defendants still had time to comply with that term of the contract.

I wish to add that, assuming that there was evidence upon which any liability on the part of the defendants could have been established, I think there would have had to be a new trial, because the questions submitted to the jury were not of themselves sufficient to justify a verdict. I think the learned judge ought to have asked first, whether the defendants were negligent under the circumstances; but assuming that such a question is sufficiently put in the question whether they knew or ought to have known that the apparatus was dangerous, a further question ought to have been asked—namely, whether the death was due to that negligence, or to the act of the deceased, or the intervention of a third party who had manipulated the needle which operated to restrain the pressure of the gas. He was asked to put a specific question as to this, but he did not do so.

In my judgment the appeal should be allowed with costs, the judgment entered below should be set aside, and judgment entered for the defendants with costs.

ROMER L.J. (read by SCRUTTON L.J.). In this case the respondents (plaintiffs in the Court below) sought at the trial to render the appellants liable in damages as persons who had delivered to the late Mr. Bottomley a thing that was dangerous per se when they knew or ought to have known of its dangerous character. Whether the dangerous thing was gas or the Halliday boiler or gas and the boiler combined was not made very clear in the argument. But seeing that the defendants did not supply any gas, and that without gas the boiler could not possibly be dangerous, it must be taken that the dangerous thing of which the plaintiffs complain was the boiler and gas combined. Treating the defendants as having supplied this dangerous thing to Mr. Bottomley, the plaintiffs allege that it caused the presence of carbon monoxide gas in the bathroom of No. 35 Denmark

Road on October 26, 1929, and so caused the deaths of Mr. Bottomley and his wife. It seems obvious that if the plaintiffs were to render the defendants liable for this catastrophe it was essential for them to prove (1.) that the apparatus when used as installed by the defendants was dangerous in that it might cause carbon monoxide to penetrate into the bathroom; (2.) that by reason of its being so used carbon monoxide did in fact find its way into the bathroom; and (3.) that this gas caused the deaths of Mr. and Mrs. Bottomley. I need not pause to consider what the plaintiffs would have had to prove in addition in respect to the knowledge or means of knowledge of the defendants. It is sufficient for the purpose to say that it was essential for the plaintiffs to prove the three facts already mentioned. Now at the trial the jury found that the apparatus when used as installed by the defendants was dangerous, and, it being admitted by the defendants that the deaths of Mr. and Mrs. Bottomley were caused by carbon monoxide, that this gas came from the apparatus in question. I do not pause to consider whether there was any evidence before the jury which could justify the first of these findings. For the jury did not find, and, in spite of the protests of the learned counsel for the defendants, were not asked to find, whether the presence of the carbon monoxide in the bathroom was caused by the use of the apparatus as installed by the defendants. Evidence had been given which would have justified a finding that the presence of the carbon monoxide in the bathroom may have been due, not to the use of the apparatus as installed by the defendants, but to its use after the adjustment of its needle made by the representative of the Gas Company had been altered by Mr. or Mrs. Bottomley or some other person. Counsel for the plaintiffs objected to any specific question being left to the jury as to the effect of this evidence, on the ground that it sought to establish contributory negligence, and that contributory negligence had not been pleaded. But the question to which the evidence was directed was not one of contributory negligence. It was the question whether there was any connection at all between the deaths and the alleged negligence of the defendants, and this question should in some form or another have been left to the jury to decide. If therefore the case could properly be considered as falling within the class of cases that govern the law as to liability of the supplier of dangerous things, I should have been of opinion on this ground alone that a new trial should be ordered.

But in my judgment the case falls within a different class altogether. Taking the facts as found by the jury with the admitted facts of the case, it seems to follow that the house No. 35 Denmark Road was, when Mr. and Mrs. Bottomley entered into possession of it, one that was in the opinion of the jury in a dangerous condition by reason of the fact that any carbon monoxide that might be generated by the use of the Halliday boiler as installed would, in consequence of the absence of a flue and the opening into the bathroom, find its way into that room and render its use dangerous. But even if this were so, the defendants cannot be liable for damage occasioned to the occupants of the house. It is true that by the agreement of September 27, 1929, the defendants had entered into an obligation towards Mr. Bottomley to complete and render the house fit for habitation to his reasonable satisfaction prior to completion. But the time for completion had not arrived at the date of the accident, and the defendants had not therefore committed any breach of their contract at that time, even if a house erected, as this one was, precisely similar in decoration and design to those already erected on the defendants' estate could in any case have been considered to be a breach of the contract. Mr. Bottomley had taken possession of the premises before completion under the provisions of clause 10 of the agreement. He did not indeed thereby waive any rights he had under the agreement, but by its express terms and pending completion he held the premises as tenant at will of the defendants. Assuming therefore that the findings of the jury are to be accepted, the case is one in which, by reason of the dangerous condition of premises that were let unfurnished, the tenant and his wife were fatally injured.

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It is, however, settled law that in such a case the landlord cannot be held liable in the absence of fraud on his part: see *Cavalier* v. *Pope* (1); *Lane* v. *Cox*. (2) There is not, of course, any suggestion of fraud on the part of the defendants in the present case, and I am unable for myself to see how, consistently with the rule enunciated in those and similar cases, the plaintiffs here are entitled to succeed.

For these reasons, the appeal should in my opinion be allowed and the judgment set aside with costs here and below.

Appeal allowed.

Solicitor for appellants: *J. Wilmer Hives.*
Solicitor for respondents: *William C. Bonney.*

(1) [1906] A. C. 428.

(2) [1897] 1 Q. B. 415.

W. H. G.

MABRO *v.* EAGLE, STAR AND BRITISH DOMINIONS INSURANCE COMPANY, LIMITED.

C. A.
1932
Jan. 11.

[1925. M. 1779.]

Practice—Application to add Party—Remedy against Other Party barred by Statute of Limitations—R. S. C., Order XVI., *r.* 2.

The Court will not, under Order XVI., r. 2, allow a person to be added as plaintiff to an action if thereby the defence of the Statute of Limitations would be defeated.

Hudson v. *Fernyhough* (1889) 61 L. T. 722, and judgment of Grove J. in *Challinor* v. *Roder* (1885) 1 Times L. R. 527, approved and followed.

APPEAL from an order of Branson J. refusing to make an order joining a party as plaintiff.

The action was commenced by two persons named Mabro to recover under a policy of insurance, effected in 1922, on 3000 cases of petroleum shipped from Alexandria to Mersina on the steamship *Berkshire*. On her voyage that vessel was seized by Greek warships and taken to Piræus, where the petroleum was condemned as prize on the ground that it was intended for the use of the forces of Turkey, with which Greece was then at war. The claim on the policy was originally made early in 1923, and the writ in the action was issued on June 5, 1925. In December, 1931, an application was made to join as plaintiff one Joseph Zok as administrator of the property of Abdul Kader Zok, who died in March, 1927, and who, it was said, was the person really interested in the insurance, the Mabros being merely agents for collection.

By their affidavit the defendants denied liability on the ground of concealment of a material fact, and they further took the point that any action by Zok was barred by the Statute of Limitations.

Branson J. refused to make the order applied for on the ground that the Statute of Limitations had run as against Zok.

The plaintiffs appealed.

Carpmael for the appellants. Branson J. took the view that by reason of the decision of the Divisional Court in

Hudson v. *Fernyhough* (1) he had no discretion in the matter but must refuse the application. In that he was wrong. The language of Order XVI., r. 2 (2), clearly gives him a discretion. As Lord Esher M.R. said in *Attorney-General* v. *Emerson* (3): "In all the rules the word 'may' has been held to mean 'may or may not.' It has been held to give a discretion, which is called a judicial discretion, but is still a discretion." This view is supported by the decision of the House of Lords in *Donald Campbell & Co.* v. *Pollak.* (4) If the application is not acceded to, the real question in dispute cannot be tried. In *Ayscough* v. *Bullar* (5) an amendment by adding a plaintiff was allowed, the Court saying that this was done "in order that the real question may be tried." It will be said no doubt that *Hudson* v. *Fernyhough* (1) has decided the point against the present contention. The decision in that case being that of a Divisional Court is not binding upon this Court, and moreover it is in conflict with the view taken by Mathew J. in chambers and Denman J. in *Challinor* v. *Roder* (6) which was not there cited. It is true that in the Divisional Court which heard *Challinor* v. *Roder* (6) Grove J. dissented, but it is submitted that the view taken by Denman J. that a party may be added notwithstanding that the Statute of Limitations may have run was correct, if, in the particular circumstances, it is just that the joinder should be made. [He also referred to *The Young Sid* (7) and Order XVI., r. 11.]

Cyril Miller for the respondents was not called upon.

SCRUTTON L.J. Mr. Carpmael has said everything that can be said in support of this appeal, but in my opinion it fails.

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(1) 61 L. T. 722.

(2) Order XVI., r. 2: "Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Judge may, if satisfied that it has been so commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just."

(3) (1889) 24 Q. B. D. 56, 58.

(4) [1927] A. C. 732.

(5) (1889) 41 Ch. D. 341.

(6) 1 Times L. R. 527.

(7) [1929] P. 190, 197.

The facts giving rise to the appeal are these: in January, 1922, an insurance against war risks was effected with the defendants on a cargo of petroleum carried by the steamship *Berkshire* from Alexandria to Mersina. On her voyage the *Berkshire* was seized by Greek warships, taken to Piræus, and her cargo condemned as prize on the ground that it was intended for the use of the forces of Turkey, with which Greece was then at war. A claim on the policy was originally made early in 1923, and the writ in the action was issued on June 5, 1925, by two persons named Mabro who, it is now admitted, have no interest in the matter. The application now before us is that a person named Zok should be added as plaintiff, as being the administrator of his father, who died in March, 1927, that is, two years after the action had been commenced by the Mabros, and who, it is said, was the person interested in the insurance. Mr. Carpmael says that we ought to accede to the application under Order XVI., r. 2, which provides that " where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Judge may, if satisfied that it has been so commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just." In my experience the Court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The Court has never treated it as just to deprive a defendant of a legal defence. If the facts show either that the particular plaintiff or the new cause of action sought to be added are barred, I am unable to understand how it is possible for the Court to disregard the statute. It has been suggested that we might allow the joinder without prejudice to any defence against the claim, but I cannot see why the parties should be put to the expense of allowing an action to proceed which is barred in law. Mr. Carpmael contended that the decision of the House of Lords in *Donald Campbell & Co.* v.

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Pollak (1) on a matter of costs has in some way enlarged the power of the Court, acting under Order XVI., r. 2, to the extent of making the matter of joining a person or adding a new cause of action, notwithstanding the Statute of Limitations, a matter of discretion. The House of Lords in that case had not the slightest intention of dealing with such a question as this; it was considering merely the powers of the judge as to costs under Order LXV. In *Nocton* v. *Lord Ashburton* (2) I observe that Lord Parmoor said this in reference to the case then before the House: "It is necessary to note that the pleadings could not be amended so as to charge negligence, if amendment was necessary, since at the date of the suggested amendment such a charge would be statute-barred." In *Hudson* v. *Fernyhough* (3), a Divisional Court, consisting of Lord Coleridge C.J. and Mathew J., took the same view that a party could not be added where the Statute of Limitations had barred the remedy. The only case which appears to be against this is *Challinor* v. *Roder*. (4) There an action was brought against three executors, the name of one appearing on the writ as John Hill instead of John Myatt. After the claim would have been barred by the Statute of Limitations as against Myatt, who had acted as an executor in relation to the subject-matter of the action, the plaintiff obtained an order to amend the writ by the substitution of Myatt's name for Hill's. On appeal the Divisional Court was divided in opinion, Denman J. holding that Myatt had been properly joined, Grove J. taking the opposite view. I prefer the view expressed by Grove J. that the Court could not amend the writ and thus deprive Myatt of the benefit of the statute. For these reasons Branson J. was right in refusing the application to add Zok as plaintiff, and the appeal must therefore be dismissed.

GREER L.J. The appellant complains of the decision of Branson J. refusing liberty under Order XVI., r. 2, or alternatively under Order XVI., r. 11, to join one Zok as plaintiff. The objection to joining him was that if he were joined and treated as a plaintiff as from the time the writ was issued the defendants would be deprived of the benefit of the Statute of Limitations. Whether the matter is one of discretion or not, it appears to me inconceivable that we should make an order which would have the effect I have mentioned. It has been the accepted practice for a long time that amendments which would deprive a party of a vested right ought not to be allowed. Branson J. has thought right to adhere to the generally accepted view, and for my part I can see no ground why we should disturb his order. I agree that the appeal should be dismissed.

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(1) [1927] A. C. 732.
(2) [1914] A. C. 932, 977.
(3) 61 L. T. 722.
(4) 1 Times L. R. 527.

Appeal dismissed.

Solicitors for appellant: *Lattey & Dawe.*
Solicitors for respondents: *W. A. Crump & Son.*

J. S. H.

494, 495, *applied.* ARGONAUT NAVIGATION CO., LTD. *v.* MINISTRY OF FOOD. [1948] 1 All E.R. 871.

Followed. S.S. ARGOBEC. [1949] 1 K. B. 572

Followed. S.S. ARGOBEC. [1949] 1 K. B. 14

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Dec. 10, 11, 14, 15.

C. WILH. SVENSSONS TRAVARUAKTIEBOLAG *v.* CLIFFE STEAMSHIP COMPANY.

Shipping—Charterparty—Seaworthiness—When Loading Completed—Deck Load "at Charterers' Risk"—Exception Clause—"Accident to Hull"—Negligence of Master—Liability of Shipowners.

The operation of loading a ship involves all that is required— i.e., stowing and, *semble*, where necessary, lashing—to put the cargo in a condition in which it can be carried.

By a charterparty a ship was to proceed to specified ports as ordered by the charterers, there load a cargo of pit props, and deliver it to an English port. By the charterparty the vessel was to be "provided with a deck load, at full freight, at charterers' risk, not exceeding what she can reasonably stow and carry." By an exception clause accidents of navigation, or latent defects in, or accidents to, hull and/or machinery were (inter alia) excepted "even when occasioned by the negligence, default, or error in judgment of the . . . . master, mariners, or other persons employed by the shipowner, or for whose acts he is responsible, ..."

The ship loaded part of her cargo at one port and then proceeded to B. to ship the remainder. When the last sling load of deck cargo had been placed on deck, but before it had been stowed, the ship took a list, first to starboard and then to port, the bulwarks carried away, and a large quantity of cargo shot overboard and was lost. The judge held on the evidence that at the time of the loss the ship was unseaworthy owing to the deck load being excessive and that the captain was negligent in loading the ship as he did. In an action by the charterers against the shipowners for the value of the cargo lost:—

Held, that as, at the beginning of the loading, the ship was seaworthy to receive and hold the cargo, and as, at the time of the loss, the operation of loading had not been completed, all the cargo not having been stowed, there was no breach of the warranty of seaworthiness and the plaintiffs were not entitled to recover.

Held, further, that, although the words in the charterparty, "at charterers' risk," standing alone, did not excuse the defendants in the case of a loss due to negligence on their part or on the part of their servants, those words must be read with the exception clause, and the effect of reading the two together was to enable the defendants to rely on the exception clause, which protected them against the consequences of such negligence.

Wade v. *Cockerline* (1905) 10 Com. Cas. 115 followed.

ACTION in the Commercial List tried by Wright J. without a jury.

By a charterparty, dated August 3, 1929, the steamship *Headcliffe*, which was stated to be of the carrying capacity of 1550 cubic fathoms, 10 per cent. more or less, was to "proceed to one or two places in the Skelleftea district as ordered by charterers" and there load a cargo of short pit props and deliver that cargo at one port on the east coast of England as ordered. The charterparty provided that the vessel should be "provided with a deck load, at full freight, at charterers' risk, not exceeding what she can reasonably stow and carry," and by clause 11, the exception clause, "the Act of God, enemies, restraints of princes and rulers, and perils of the seas excepted. Also fire, barratry of the master and crew, pirates, collisions, strandings and accidents of navigation, or latent defects in, or accidents to, hull and/or machinery, and/or boilers, always excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other persons employed by the shipowner, or for whose acts he is responsible, not resulting, however, in any case from want of due diligence by the owner of the ship, or by the ship's husband or manager."

The vessel loaded part of her cargo at Bjornsholmen and then proceeded to Burea to ship the remainder of her cargo. The loading of the deck cargo was nearly finished when the captain arrived on board. At that time the vessel had a slight list to port—2 or 3 degrees—and the captain was in some doubt whether he ought to take any more cargo. There were, however, some props lying alongside which had been rafted down in the ordinary course, and the captain acceded to the stevedore's request that this small quantity of three or four slings, each sling weighing about a ton, should be taken on board and put on the starboard side. The captain then went into his cabin, and, while he was in his cabin, where he had been joined by the chief officer, the ship took a list to starboard in place of the port list. She possibly hung for an appreciable time, and then the bulwarks in the forward part of the ship, where the loading operations were proceeding, carried away on the starboard side, a large quantity of cargo shot overboard, and the ship then swung back to port, the same thing happening on the port side.

The bulwarks carried away and a considerable quantity of cargo shot overboard.

In the present action the charterers claimed against the owners of the ship the value of the cargo so lost, it having been carried out to sea and rendered irrecoverable. It was agreed between the parties that, in the event of a finding of liability, the amount of the damages should be the subject of a reference.

van den Berg K.C. and *H. Atkins* for the plaintiffs.

Le Quesne K.C. and *Sir Robert Aske* for the defendants.

Wright J. found on the evidence that at the time of the loss the ship was unseaworthy owing to the deck load being excessive and that the captain was negligent in loading the ship as he did. His Lordship continued: What, then, are the consequences? In this charterparty there is no exception of unseaworthiness, and, therefore, if my finding that the ship was unseaworthy in the sense that she was at the moment in question unfit safely to load and to carry the cargo which was put on board amounts to a finding that there was a breach of the warranty of seaworthiness, the plaintiffs are entitled to recover.

The warranty of seaworthiness is not a continuing warranty. There is no suggestion here that at the beginning of the loading at Burea the ship was not perfectly seaworthy. The trouble which arose followed from acts done in the course of the loading at Burea, and those acts in no way affected the fulfilment of the initial warranty when the loading began. It is, however, contended by Mr. van den Berg that at the moment of the casualty a new stage had begun—namely, the stage which comes on completion of loading—and that the vessel, having entered upon that stage, for this purpose was unseaworthy, because the conditions, which I have found constituted unseaworthiness, were in existence at the beginning of that stage and, therefore, that the plaintiffs must recover. That there are stages of unseaworthiness on a voyage is well established. In particular, it has been held that when a vessel is loading in port the first stage is on the beginning of the operation of loading, and the vessel must be at that stage fit to receive and hold the cargo in the conditions existing at the place of loading. When the loading is completed a new stage begins. Whether the next stage is one which involves the fitness of the vessel with the cargo on board to proceed on her voyage, or whether before that stage begins there is an intermediate stage at the beginning of which the vessel, though not fit to proceed on her voyage in the open sea, is still fit either to lie in the port or to proceed down some sheltered waters before she enters on the open sea must, I think, depend on the circumstances of the case. If it were necessary here to decide the question, having regard to the fact that this vessel was loading in an open roadstead, which at least in certain winds might be very dangerous, and would proceed to sea at once when the loading was completed, it seems to me that the intermediate stage of waiting, or of proceeding in sheltered waters, ought not to be held to exist, because it appears to me undesirable to multiply unduly stages of unseaworthiness unless the circumstances of the case require it. But there can be no doubt that there is, in a case like this, for the purpose of the warranty of seaworthiness, the stage which begins at the commencement of the loading and ends on the completion of loading, whereupon a new stage for the warranty of seaworthiness will begin.

The latest case on that point is *Reed & Co.* v. *Page, Son & East, Ld.* (1), and an earlier case is *Wade* v. *Cockerline.* (2) In *Wade* v. *Cockerline* Vaughan Williams L.J. states the proposition, perhaps tentatively, in this way (3): "It may be that there is a warranty of fitness of the ship to receive the cargo, and it may be that, after the goods have been received and have been stowed, before the ship sails away, there is a warranty that the ship is in such a condition as to be fitted safely to hold and keep the goods which have been stowed." Vaughan Williams L.J. did not consider it necessary to express a definite conclusion on that point, because, as he went on to say, "in my opinion it is perfectly plain (in fact, it is admitted) that this ship was in a condition which made her perfectly fitted for the reception of this cargo, and in my judgment, the accident which occurred and which resulted in the loss of part of the timber which was being loaded, was an accident that occurred in this stage of the transaction—that is to say, in the course of the reception of the goods; and it matters not for the purpose of this decision what may be the warranty at the next stage, that is, at the stage when the stowed goods have to be held and taken care of after they have been stowed." He goes on to say: "In my judgment it is perfectly plain that she was fitted to receive this cargo, and it is equally plain that the operation of reception had not come to an end, and that we need not, therefore, trouble ourselves as to what warranties would arise at subsequent stages in the transaction." In *Reed & Co.* v. *Page, Son & East, Ld.* (1) the principles which are stated tentatively in *Wade* v. *Cockerline* (2) are stated clearly and affirmatively by the Court of Appeal, where it was held, in the words of Scrutton L.J. (3), "that the barge was unseaworthy as a barge from the time loading finished, unfit to lie in the river, and still more unfit to be towed."

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(1) [1927] 1 K. B. 743.

(2) (1904) 10 Com. Cas. 47; affirmed (1905) C. A. 115.

(3) 10 Com. Cas. 120.

The question here is whether the case falls within *Wade* v. *Cockerline* (2) or *Reed & Co.* v. *Page, Son & East, Ld.* (1) That depends on the question whether the stage had been reached when the loading was completed. It has been contended very strenuously by Mr. van den Berg that that stage had been reached because, in his submission, loading for this purpose means simply the reception of the goods on board, and the moment the last parcel of cargo which it is intended to load is placed on the vessel the loading is completed notwithstanding the fact that some stowage may be necessary and may commonly be done. I do not think that that is the law. I think that in a case like this, and, indeed, in most cases, the mere reception or dumping down of the cargo on

(1) [1927] 1 K. B. 743.

(2) 10 Com. Cas. 115.

(3) [1927] 1 K. B. 756.

the ship does not involve the completion of the loading, because I think the operation of loading involves all that is required to put the cargo in a condition in which it can be carried. In this case the operation of stowing the cargo was comparatively simple. The pit props came up from the water in the ship's slings and were slung on to the deck. Then the sling was released, but, before it was released, the sling was put in such a position that the props would fall in the proper direction—that is, lying fore and aft—and would more or less sink into their places. Some operation of stowing, however, was necessary in respect of each such sling—some props would not fall in the right position and would have to be straightened out, and the props generally would have to be arranged so that they would lie as closely as possible together with their round sides as neatly in contact as could be achieved. That was a small operation, no doubt, but it was done sling by sling before the next sling could come on board, and it had to be done in respect of the last load. It might only take one, two, three, or four minutes in respect of each sling load, but it was, in my judgment, a necessary part of the operation of loading. There has been some debate in and on the evidence whether that operation had actually been completed. On the whole I am convinced that the operation of stowing the last sling load had not been performed, and, therefore, that the loading was not completed at the moment when the accident happened. Indeed, it would be extremely artificial to hold that this accident occurred after the warranty that the ship was fit to receive and load the cargo had expired because, in my judgment, what caused the accident and all the trouble was the putting of these extra sling loads on board, and, in particular, the last sling load. It was the last straw and it caused the ship, unstable as she was, to adopt the change of motion which led to the casualty. It seems to me that that happened, and must have happened, while the operation of loading was still in fieri.

If it were necessary to decide the matter, but it is not, I should also hold that in the facts of this case the lashing was

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Wright J.

a necessary part of the operation of loading. The ship, as I have said, was lying in an open roadstead. Though the lashing is done by the crew, it is done immediately after the stevedores have finished their work—the crew were actually engaged in lashing the after-deck cargo when this accident occurred—and I think that it is an integral part of the operation of loading in the case of a vessel situated like this and lying with her deck cargo in an exposed roadstead. But it is not necessary to decide that point because I am satisfied that the operation of loading had not been completed, and that the second stage for the purpose of the warranty of seaworthiness had not been reached. I hold, therefore, that there was no breach of the warranty of seaworthiness and the plaintiffs are not entitled to recover on that ground.

I have now, therefore, to consider the alternative claim based on the negligence of the officers of the ship. I have found that there was such negligence and I must decide what effect is to be given to the exceptions in the charterparty. There are two exceptions to be considered. There is the exception " a deck load at charterers' risk," and there is the series of exceptions contained in clause 11. Mr. Le Quesne has contended that he is entitled to a wider protection by the former of these exceptions and has submitted a very careful argument on that point. He relies on certain authorities, in particular on the language used in *Burton & Co.* v. *English & Co.* (1) In that case Bowen L.J. says (2): " Now the words we have to construe are these: after providing in the earlier part of the charterparty that 'the ship is to load from the factors of the merchant a full and complete cargo,' etc., etc., it states that 'the steamer shall be provided with a deck load if required at full freight, but at merchant's risk.' Now that clearly is a stipulation in favour of the shipowners, and prima facie it seems to me meant to relieve them from the responsibility of some act of their servants by which they would otherwise be bound, and from the incidents of some risk which otherwise would fall upon them as carriers and under their contract of carriage. It would, I think, clearly cover improper jettison, also it would cover negligence of the captain or crew, occasioning stranding or collision, and any other acts, if any there be, of the servants of the shipowners for which they would otherwise be responsible." It does not appear in the report whether there were any other relevant exceptions in that charterparty. That is a dictum, because it was not necessary for the decision. The claim in that case was a claim by the charterers against the shipowners for a general average contribution, and it was held by the Court of Appeal that that right of contribution was not affected by those words of exception. But the dictum was, I think, accepted as giving the construction of these words in *Wade* v. *Cockerline* (1), by Kennedy J., who says: "The true meaning of clauses of this kind in charterparties is always so far open to question that I hesitate to use any expression of strong confidence with regard to my own view, but it seems to me, as at present advised, that if it were necessary to decide the point, there is no reason why I should not hold that the words 'at charterers' risk' cover the loss." Kennedy J., however, goes on to say: "I am content to rest my judgment upon clause 7"—which is substantially, if not entirely, identical with clause 11 in this case. He adds: "It seems to me that this clause, apart from any other provision of the charterparty, affords a complete defence for the defendants." When that case went to the Court of Appeal (2) there was an elaborate argument on this clause by Mr. Hamilton, as he then was, who contended that clause 7 did not apply to the deck cargo at all, and that the words "at charterers' risk" had to be construed as subject to a proviso that they were meant only to apply if the ship was not a cause of damage by negligence, especially as negligence was expressly dealt with in clause 7 of the charterparty. The Court of Appeal do not seem to have given any opinion on this argument, but, like the trial judge, they decided the case on the express terms of clause 7, which they held applied. The learned reporter in his headnote says: "*Semble* the owners were also protected by the words 'at charterers' risk,'" but I think

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(1) (1883) 12 Q. B. D. 218.

(2) 12 Q. B. D. 222.

(1) 10 Com. Cas. 47, 51.

(2) 10 Com. Cas. 115.

it difficult to find that in the judgments. The argument of Mr. Le Quesne was based, apart from arguments of principle, on these authorities, where, in no instance, was the opinion expressed necessary to the decision of the case.

It is quite clear, in my judgment, on the authorities as they now stand, that the words "at charterers' risk," standing alone and apart from any other exception in the charterparty, do not excuse the shipowner in the case of a loss due to the breach of warranty of seaworthiness. That, if it needed authority, is clearly laid down by the Court of Appeal in *The Galileo* (1), and I do not find any reason to qualify that conclusion by anything that I find in the decision of the same case in the House of Lords. (2) The words "at charterers' risk" would clearly also not apply to damage occurring after a deviation. These limitations on the apparent generality of the words are, I think, too clear to need further discussion, and I think that the words, standing by themselves, have also to be read as limited to losses and damage where there has been no negligence on the part of the shipowner or his servants. That is clearly stated by Bankes and Scrutton L.JJ., sitting as a Divisional Court, in *Mersey Shipping and Transport Co.* v. *Rea, Ld.* (3), and is deduced from the principles well established and laid down in the Court of Appeal in *Price & Co.* v. *Union Lighterage Co.* (4) Mr. Le Quesne, however, has argued that, though that is so if the clause stands by itself, yet, if there is an exception clause—such as clause 11 here and clause 7 in *Wade* v. *Cockerline* (5)—then the principles stated by Bowen L.J. in *Burton & Co.* v. *English & Co.* (6) must be applied, and the words must be construed as giving some wider extension to an exception of negligence. For that he cites the authorities to which I have referred and, if those authorities were not simply matters of observation, I should feel bound to follow them. But, as they are matters of observation, it seems to me, applying the principles which I find in the authorities, I must hold that this argument

(1) [1914] P. 9.
(2) [1915] A. C. 199.
(3) (1925) Unreported. See 21 Ll. L. Rep. 375.
(4) [1904] 1 K. B. 412.
(5) 10 Com. Cas. 115.
(6) 12 Q. B. D. 218.

fails and that the words "at charterers' risk," whether they are found alone or whether they are found in conjunction with an exception clause, such as clause 11 here, do not in themselves contain any exception of negligence. If they were to be construed in their isolation as involving an exception of negligence, then that exception would have to be construed along with the other exception clause, clause 11, because the general exceptions of the charterparty apply to a deck cargo where, as here, the cargo is carried with authority either express or by custom. If, on that view, the clauses were to be construed, the one as containing a wider exception of negligence and the other as containing a narrower exception of negligence, then, on the principle of *Elderslie Steamship Co.* v. *Borthwick* (1), the shipowner would be only able to avail himself of the exception which was less beneficial to himself. On the other hand, if the words "at charterers' risk" are to be construed as subject, among other things, to a limitation of negligence, then I see no difficulty in reading those two clauses together. The case is not as if there were an express exception of negligence in the charterers' risk clause, which was general in its terms and which would be cut down by the narrower clause. Nor has clause 11 to be cut down by reason of the fact that the general clause "at charterers' risk" contains no exception of negligence, because that is not a matter of express language, but merely a matter of implication and the application of ordinary rules of construction.

It seems to me, therefore, that the true position here is that the words "at charterers' risk" have to be read along with clause 11, and that the effect of reading the two together is to enable the shipowners to rely on clause 11, but that that is the full extent of the exception available for them. That is exactly the conclusion arrived at in *Wade* v. *Cockerline* (2) in the actual decision, and, therefore, I arrive at the position in which I simply follow that and apply that notwithstanding the arguments which have been put forward. A similar view has been

(1) [1905] A. C. 93.

(2) 10 Com. Cas. 115.

adopted by Roche J. in *Herbert Whitworth, Ld.* v. *Pacific Steam Navigation Co.* (1)

There still remains the question whether clause 11 protects the shipowners in the circumstances of this case against the consequences of the negligence of their servants. The words relied on by Mr. Le Quesne here are primarily "accidents to hull," and I think he is entitled to succeed on those words. What happened here, in my judgment, was that the cargo was lost by reason of the carrying away, first, of the starboard, and then of the port, bulwarks as the ship rolled from side to side. The impact of heavy timber carried away these protections and the cargo shot overboard, and it seems to me that there was an accident to the hull just as there would have been if cargo had escaped overboard through an aperture made by a collision. In this case the break in the protecting fabric of the hull was made by the cargo itself, and was due to the ship heeling over by reason of the negligent way in which she was being loaded. I hold, therefore, that the shipowner was protected by these words, and although the present case is not precisely covered by the decision of the Court of Appeal in *Wade* v. *Cockerline* (2), where the same words were held to apply, I think that the circumstances are so analogous as to bring this case within the same principle. The defendants, therefore, are protected by these words.

That renders it unnecessary for me to consider the further submission of Mr. Le Quesne, which I merely mention so that, if necessary, it may be open to him—namely, that the words "accidents of navigation" apply. There is a good deal to be said for that argument, but, in my judgment, the word "navigation" in this connection ought to be limited to matters done in the handling of the ship in what is naturally called navigation, that is to say, when she is under way.

For the reasons I have stated, I think that the plaintiffs are met by the exception clause. The defendants are entitled to succeed on it, and there will be judgment for them with costs.

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(1) (1926) Unreported. See 25 Ll. L. Rep. 573.

(2) 10 Com. Cas. 115.

Judgment for defendants.

Solicitors for the plaintiffs: *Denton, Hall & Burgin.*

Solicitors for the defendants: *Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-on-Tyne.*

G. F. L. B.

In re COLETTA. (1)

K. B. D.
1931
July 23, 28.
C. A.
Nov. 30.

Licensing—Permitted Hours—Extra Hour of Opening—Certificate of Justices—Withdrawal—Appeal to Quarter Sessions—Jurisdiction—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 29, *sub-s.* 1—*Licensing Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 42), *ss.* 3, 22, *sub-s.* 2.

There is no appeal to quarter sessions from a decision of licensing justices withdrawing their certificate granted in respect of licensed premises under s. 3, sub-s. 2, of the Licensing Act, 1921, without which the holder of the licence is not entitled to elect under s. 3, sub-s. 1, to keep the licensed premises open for one hour after the permitted hours for the sale or supply of intoxicating liquor for consumption at a meal supplied at the same time in the part of the premises set apart for meals.

So *held* by Lord Hanworth M.R., Lawrence and Slesser L.JJ., affirming Lord Hewart C.J., Avory and Acton JJ.'s decision.

Rule Nisi for certiorari to bring up and quash an order of quarter sessions.

In 1921 the licensing justices for the St. James (Piccadilly) division of the County of London granted a certificate under s. 3, sub-s. 2, of the Licensing Act, 1921 (11 & 12 Geo. 5, c. 42), to the then licence holder of the Queen's Hotel, Leicester Square, in pursuance of which he was entitled to elect under s. 3, sub-s. 1, to supply intoxicating liquor during the hour immediately following the permitted hours, provided that it was supplied, in the part of the premises set apart for meals, for consumption at a meal supplied at the same time. In 1924 one Pasquale Coletta became the licence holder and the certificate continued until 1931, when the justices, while renewing the licence, withdrew this certificate because it was alleged by the police that the premises were not bona fide used for the purpose of habitually providing substantial refreshment to which the sale of intoxicating liquor was ancillary within the meaning of s. 3, sub-s. 2, of the Act. Mr. Coletta appealed from this decision to quarter sessions, which on April 24, 1921, made an order allowing the appeal. The Commissioner of Police then obtained this rule on the ground that quarter sessions had no jurisdiction to hear the appeal.

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(1) In the lists in the Divisional Court sub nom. *The King* v. *County of London Justices. Ex parte Commissioner of Police for the Metropolis.*

Comyns Carr K.C. and *Walter Frampton*, for the justices, showed cause. The applicant is not a person aggrieved within the meaning of s. 29 of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24); he is not a party to the proceedings.

The licensee had a right to appeal to quarter sessions against the withdrawal of the certificate. No doubt no appeal is in terms given, but by s. 22, sub-s. 2, of the Licensing Act, 1921, that Act is to be construed as one with the Act of 1910: and see per Lord Selborne in *Canada Southern Ry. Co.* v. *International Bridge Co.* (1) and *Hart* v. *Hudson Brothers, Ld.* (2) By s. 29, sub-s. 1, of the latter Act an appeal is given to a person aggrieved by the refusal of justices to renew a licence; and the licensee is a person so aggrieved. This certificate, though in form a separate document, is really an adjunct to the licence, and the licensee has, as part of the rights thereby conferred, and which follow the grant automatically, the right to give the notice to the police, etc., specified in s. 3, sub-s. 3, of the Act of 1921, and r. 6 of the Licensing Rules, 1921 (S. R. & O., 1921, No. 1313), as a preliminary to obtaining the certificate. He will not get it unless the justices are satisfied under s. 3, sub-s. 2, of the Act of 1921 that the premises are structurally adapted, and used bona fide for the purpose therein indicated. In effect the justices have refused to renew the licence except subject to certain conditions. Therefore there was an appeal to quarter sessions under s. 29, sub-s. 1, of the Act of 1910.

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(1) (1883) 8 App. Cas. 723, 727.

(2) [1928] 2 K. B. 629.

[*Rex* v. *Spelthorne Licensing Justices. Ex parte Turpin* (1) was also referred to.]

Roland Oliver K.C. and *G. D. Roberts* in support. The right of appeal is entirely the creature of statute—see per Kennedy L.J. in *National Telephone Co.* v. *Postmaster-General* (2), and there is no statute which in terms gives a right of appeal in this case. The only appeal must be something which can be described as an appeal against a refusal to renew a justices' licence, under the combined effect of s. 3, sub-s. 2, of the Licensing Act, 1921, and s. 29, sub-s. 1, of the Licensing (Consolidation) Act, 1910. A refusal to grant the certificate could not have been described as a refusal to grant the licence, and if that is so it is difficult to see how the withdrawal of the certificate can be treated as a refusal to renew the licence. The certificate is not part of the licence but something which can be added to it in suitable cases. But it has nothing to do with the licence, which still continues in force if the justices refuse to grant or withdraw the certificate. Sect. 3 of the Act of 1921, under which this certificate is granted, is only part of a scheme for the regulation of hours.

[Form IV. in the schedule to the Licensing Rules, 1921, was also referred to.]

Lord Hewart C.J. This case raises an interesting point. It is a rule nisi for a writ of certiorari to bring into this Court an order of quarter sessions dated April 24, 1931, allowing an appeal against a decision of licensing justices withdrawing a certificate under s. 3, sub-s. 2, of the Licensing Act, 1921, on the ground that quarter sessions had no jurisdiction to hear the appeal. I was much attracted by Mr. Comyns Carr's argument in support of that contention, but I am satisfied by what Mr. Roland Oliver has said that there was

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(1) [1926] 2 K. B. 519.

(2) [1913] 2 K. B. 614, 621.

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no right of appeal in this case. In order to get an appeal by the combined effect of s. 22, sub-s. 2, of the Act of 1921 and s. 29, sub-s. 1, of the Act of 1910, the matter has to be put on the footing of a refusal to renew the licence. When I look at the words of s. 3, sub-s. 2, of the Act of 1921 it seems to me impossible to treat the matter in that way. An original refusal to grant the certificate could not have been described as a refusal to grant the licence, and therefore I do not think that the withdrawal of the certificate is a refusal to renew the licence. As the legislation stands I do not think there is an appeal in these cases, and it follows that the rule must be made absolute.

AVORY J. I am of the same opinion. There can be no doubt that the right of appeal is a creature of statute, and unless the right can be found by the combined effect of s. 29, sub-s. 1, of the Licensing (Consolidation) Act, 1910, and s. 22, sub-s. 2, of the Licensing Act, 1921, it does not exist. That means that if a right of appeal is to be established it must appear that there was a refusal by the justices to grant a renewal of a justices' licence. The whole question in this case is whether there was such a refusal. Looking at the provisions of s. 3 of the Act of 1921 I am satisfied that the certificate which may be granted thereunder is not a part of the justices' licence. In my view the only ground upon which the argument for the applicant could be founded is that the certificate is part of the licence. But having regard to s. 3 of the Act of 1921 and to Form IV. in the schedule to the Licensing Rules, 1921, the certificate appears to me to be an independent document—an authority apart from the licence itself—to do something which would otherwise constitute an offence. When I look at the notice given to the applicant by the police it is clear that it does not amount to a notice of objection to the renewal of a licence, for it is in terms a notice that they intend to object to the applicant continuing to hold the certificate under s. 3. That section has no application to any premises unless the justices (sub-s. 2) "are satisfied that they are structurally adapted and bona fide used or intended to be used for the purpose of habitually providing, for the accommodation of persons frequenting the premises, substantial refreshment, to which the sale and supply of intoxicating liquor is ancillary,'' and it appears to me clear that when the application is made in the first instance, and the justices proceed to consider whether the premises come within s. 3, sub-s. 2, no appeal could be entertained from a refusal of the justices to be satisfied that the premises did come within that sub-section. But if there is no appeal from a refusal in the first instance, I cannot see how it can be successfully contended that an appeal will lie when an application is made to the justices, not to refuse the renewal of a licence, but to say that they are no longer satisfied that the premises come within s. 3. In other words this is not a refusal to renew a justices' licence, and consequently no appeal lies from the decision of the justices.

Acton J. I agree, and have nothing to add.

Rule absolute.

W. L. L. B.

The licence holder appealed. The appeal was heard on November 30, 1931.

Sir Leslie Scott K.C. and *Walter Frampton* (*Sir Patrick Hastings K.C.* with them) for the appellant. Under the Licensing Act, 1921, the old system of closing hours for licensed premises was abandoned, and for it was substituted by ss. 1 and 2 new provisions fixing hours during which intoxicating liquor might be sold and supplied on any licensed premises. For the Metropolis the permitted hours ended on week days at 11 P.M., and by s. 3, sub-s. 1, the holder of the licence was given a right to elect to keep open for an additional hour for the sale of intoxicating liquor for consumption at a meal; but by sub-s. 2 this section only applied to licensed premises for so long as the licensing justices were satisfied that the conditions mentioned there were fulfilled. It is contended that the withdrawal by the justices of their certificate of satisfaction is in effect a refusal to renew the licence so as

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to give rise to a right of appeal under the Licensing (Consolidation) Act, 1910, s. 29. That Act and the Act of 1921 are by s. 22, sub-s. 2, of the later Act to be construed as one. The effect of the licence granted under s. 9 of the Act of 1910 is to permit the sale of intoxicating liquor on the licensed premises during the permitted hours. By s. 3 one hour is added to the "permitted hours" as they are defined in s. 20. The moment therefore before the application for renewal the licence holder was entitled to keep the licensed premises open for the sale of intoxicating liquor till midnight. On the withdrawal of the certificate he was only entitled under the renewed licence to do so until 11 P.M. By s. 16 of the Act of 1910 "the renewal of a justices' licence means the grant of a justices' licence . . . . by way of renewal of a similar licence." The withdrawal of the certificate prevents therefore the act of the justices from constituting the grant by way of renewal of a "similar licence." Renewal has therefore been refused and thereupon the right to appeal to quarter sessions arose under s. 29 of the Act of 1910.

The Licensing Rules, 1921, made by the Home Secretary under s. 12 of the Act of 1921 contain in rr. 6, 7 and 8 provisions as to the granting of certificates under s. 3, sub-s. 2. It is not suggested that if a right of appeal is not given by the Act it is given by the rules, for under s. 12 the rules are limited to rules as to procedure. It may well be that in some respects the rules are ultra vires, but that again is not material for the purpose of this appeal. The dominant idea in those rules seems to be that the right under s. 3 is the subject of grant, and that the "powers" with which the rules are concerned are powers to make a grant. This is incorrect; the right is given by s. 3, sub-s. 1, subject only to the conditions mentioned in s. 3, sub-s. 2, being fulfilled to the satisfaction of the justices.

Further, the powers exercised by the licensing justices under s. 3, sub-s. 2, are judicial in nature to the extent that they have to be satisfied that the conditions are fulfilled. A right of appeal would naturally be given in such a case.

[SLESSER L.J. The licensee's right to elect to add to the permitted hours arises only when the certificate has been given.]

Yes. But as soon as the justices are satisfied the condition precedent to election is fulfilled, and when the election has been made a right to sell intoxicating liquor until 12 midnight has arisen as part of the right enjoyed by virtue of the licence. The licence carries with it the right of election, and after election the licence becomes an extended licence, so that renewal of the licence without a certificate under s. 3, sub-s. 2, is not a grant by way of renewal of a "similar" licence. When the two Acts are read together it becomes clear that the right to sell intoxicating liquor for an additional hour flows from the grant of a licence, and it is not a separate privilege granted separately. Thus no provision is made in the Act for a separate transfer of the right under s. 3 to a new licensee on a transfer of the licence itself.

Roland Oliver K.C. and *G. D. Roberts* for the Commissioner of Police. The statute gives no right of appeal under s. 3 of the Act of 1921 and no right of appeal can therefore exist. It is fallacious to say that there has been a refusal to renew the licence. It was renewed in exactly the same form in which it was originally granted. So far as the powers of the licensing justices are concerned the Legislature has been chary of giving a right of appeal. The only rights of appeal given are: (1.) under s. 29 of the Act of 1910 against a refusal to renew a licence, and (2.) under s. 72 of that Act against a direction of the justices for structural alterations of licensed premises. These limited rights of appeal may be contrasted with the general right of appeal given by s. 99, sub-s. 2, against decisions as to offences under the Act by a court of summary jurisdiction. In view of the large number of matters dealt with by licensing justices, and the fact that express rights of appeal are given in clear language in regard to the two matters mentioned above, it is impossible to construe the Acts as giving rights of appeal by implication.

[They were stopped.]

Sir Leslie Scott K.C. replied.

LORD HANWORTH M.R. This appeal fails. It raises an interesting point in respect to matters dealt with by the Licensing Act, 1921. I will state the facts shortly so as to indicate the point that emerges under the statute.

The licence in question which is held by the appellant is an old licence in the sense that it is one which has been granted for many years to hotel premises in Leicester Square. It was in existence before the present appellant became the transferred holder of it. It is a licence, therefore, which must be renewed unless the licensing justices, when it comes up at the licensing sessions in March for renewal, decide to refuse it on the limited grounds which are permitted by the statute. The Act of 1921 gave a further right or liberty under s. 3, whereby special provision was made as to the extension of permitted hours in the evening in certain premises. In order to take advantage of that section, it was necessary for the holder of the licence to get a certificate from the licensing justices that the premises conformed to the terms of s. 3, sub-s. 2, of the Act of 1921. The statute had received the Royal Assent on August 17, 1921, and it was provided by what may be called a temporary provision for this certificate to be considered and dealt with at the transfer sessions as apart from the General Annual Licensing Meeting of Justices. The transfer sessions were held on September 28, 1921, for the Division of St. James in the County of London, and on that date the licensing justices for that division certified that "they are satisfied that the licensed premises, the Queen's Hotel, are structurally adapted and bona fide used for the purpose of habitually providing for the accommodation of persons frequenting the premises substantial refreshment to which the sale and supply of intoxicating liquor is ancillary." That certificate having been granted, it became open to the holder of the licence to elect in accordance with s. 3, sub-s. 1, to have an hour added on to the end of the permitted hours for the sale of intoxicants. That certificate apparently continued and was not withdrawn, and the licence was renewed year by year. But, on January 22, 1931, the sub-divisional inspector gave notice to the holder of the licence, Mr. Pasquale Coletta, that he intended to "object to your continuing to hold the certificate under s. 3 of the Licensing Act of 1910, and to ask that the same be withdrawn." That notice was given in pursuance of the terms of the section and the regulations made thereunder. Thereupon, when the Licensing Sessions were held, that objection was taken, with the result that, while the justices renewed the licence to sell intoxicating liquor, they withdrew the certificate to which I have referred. Upon that decision an appeal was taken by the licensee to quarter sessions, and quarter sessions, on April 24, 1931, restored the certificate and allowed the appeal. Thereupon application was made to the King's Bench Division of the High Court of Justice for a certiorari in order to bring up that order of quarter sessions to be quashed on the ground that quarter sessions had no jurisdiction whatever to hear the appeal. A rule nisi was obtained, and cause was shown on July 28, when the rule for a certiorari was made absolute, and it was ordered by the King's Bench Division that a writ should issue to remove into the Court that order of the court of quarter sessions, and it was further ordered that such order after return should be quashed. From that decision of the King's Bench Division, this appeal is now brought to this Court.

The question we have to decide, therefore, is whether or not there is an appeal on this matter of the certificate from the licensing justices to quarter sessions. It is conceded on all hands that an appeal is the creature of statute. It is pointed out that provision is made by the Licensing (Consolidation) Act, 1910, for a right of appeal in certain cases. By s. 22 of the Licensing Act, 1921, it is provided that that Act is to be construed as one with the Licensing (Consolidation) Act, 1910, and the two Acts are to be read together and cited together. Hence on what may be called general matters, such as the question of appeal, regard must be had to the Act of 1910. It is said that by s. 29 powers of appeal are given which will cover the point raised in the present case. Sect. 29 provides: "Any person who thinks himself aggrieved by the refusal of the licensing justices of any licensing district to grant a renewal, transfer, or special removal of a justices' licence . . . . may appeal against the refusal to the court of quarter sessions for the county in which the premises in respect of which the appeal is made are locally situated." It is said that these words justify the present appeal. I think it is right to point out that just as the right of appeal is a creature of statute, so the statutes are careful in certain cases to provide rights of appeal. For illustration, s. 72 deals with the powers of justices to require structural alterations in licensed premises, and it provides that there shall be an appeal in such a case. It is quite true that that deals with what may be called a side issue to the grant of the licence. But still it shows that the legislature has been careful in particular cases (whether on the main point of the grant of the licence or on subsidiary points) to deal specifically with cases where an appeal is to be given. Similarly, in s. 99, sub-s. 2, where an appeal is given against decisions concerning offences under the Licensing Act: "If any person feels aggrieved by an order or conviction made by a court of summary jurisdiction under this Act, he may appeal therefrom to quarter sessions."

I call attention to those sections, because it is sometimes suggested that it seems so unlikely that the legislature should, in an Act of Parliament, have failed to give a certain right, that an effort ought to be made to strain the words of the Act of Parliament so as to embrace what the Court may think would have been useful had it been incorporated. But having regard to ss. 22, 29 and 99, I think the Court has to be content to recognize that the legislature intended to grant an appeal only in those cases covered by those particular sections.

The only section which it is said will cover this case is s. 29, and it is said to cover it because this appellant feels himself aggrieved by the refusal of the licensing justices to grant a renewal of a justices' licence. I have pointed out that they did not purport so to do. They granted a renewal of the licence, but withdrew the certificate given under s. 3, sub-s. 2, of the Act of 1921. But it is said that the certificate added a good deal to the value of the justices' licence by enlarging the length of time during which there could be a sale of intoxicants. It enabled a whole hour to be added to what are the permitted hours. Hence it is said that this certificate ought to be treated as an integral part of the justices' licence.

After considering very carefully the argument which has been presented to us by Sir Leslie Scott, we are unable to take that view. It must be remembered that, under the system which now prevails under the Act of 1921, there are certain permitted hours for the sale of intoxicating liquor. There were certain variations allowed in the times of commencement and termination of those permitted hours, enabling adjustments to be made to suit the particular district. Broadly speaking, certain permitted hours are allowed under s. 1 of the Act of 1921, the exact incidence of those hours to the clock being capable of adjustment and alteration. Sect. 3, sub-s. 1, of the Act added something more: "The provisions of this Act as to permitted hours on week-days shall, as respects licensed premises or clubs to which this section applies, have effect, if the holder of the licence or the committee of the club so elects, as though one hour were added to the end of the permitted hours in the evening." The permitted hours there referred to must mean the permitted hours as specified in s. 1 of the same Act, and not the permitted hours as interpreted by s. 20, where the permitted hours are simply defined as the hours during which liquor may be sold or supplied.

That election by the licensee is not to be operative until the licensee has a certificate under sub-s. 2. Sub-s. 2 reads as follows: "This section applies to any licensed premises or clubs if and so long as the licensing justices are satisfied that they are structurally adapted and bona fide used or intended to be used for the purpose of habitually providing, for the accommodation of persons frequenting the premises, substantial refreshment, to which the sale and supply of intoxicating liquor is ancillary." The certificate therefore has to be granted so long as the licensing justices are satisfied on those points; but there are no words which incorporate that

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certificate or that satisfaction with the ordinary justices' licence. The obtaining of the certificate is merely a preliminary which does not necessarily involve the licensee in any duty. But once he is armed with that certificate he can elect to keep open as though one hour were added at the end of the permitted hours in the evening. I think under sub-s. 3 that the election would hold good during the current year's licence, but it still remains a privilege given to him upon his election, and not something granted to him as a part of the licence. It is not something in respect of which he has rights similar to his right to renewal of the licence at the hands of a licensing justice, but a liberty which he can elect to exercise so long as he can show that the justices are satisfied with the structure of the premises and the bona fide user and intention to use those premises for the provision of substantial refreshment with which the intoxicants are to be supplied. I find myself unable to see in that section the creation of an additional right to be vested in the licensee under his justices' licence or to treat the limited power of the justices to refuse a renewal of a licence as applying to the certificate and the liberties which may be exercised by the licensee after his election upon it. It follows that the special provision in s. 3 as to the extension of the permitted hours lies outside the whole matter of the renewal of the licence. It is a matter ancillary to the licence. It is a liberty which the licensee may exercise, but is not bound to continue to exercise.

On these grounds, it appears to me that it is quite impossible to hold that the section which grants an appeal in respect of a refusal to renew a justices' licence embraces a case which deals only with this subsequent and ancillary right of the holder of that licence upon his election to keep open his premises for the sale of intoxicating liquor for an extra hour so long as, and only so long as, the justices are satisfied under sub-s. 2.

For these reasons I am of opinion that there is no appeal granted in such a case to a licensee, and therefore the order of the Divisional Court was right, and must be affirmed with costs.

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LAWRENCE L.J. I agree. Sect. 3 of the Act of 1921 confers certain privileges on the holder of a justices' licence if (inter alia) the holder can satisfy the justices that the licensed premises are structurally adapted and bona fide used in the manner indicated in sub-s. 2 of that section. The rules made under the Act provide that the satisfaction of the justices in these respects is to be evidenced by a certificate, and the point made by the appellant is that such a certificate, when granted, forms part of the justices' licence. In my judgment that contention is not well founded.

It is admitted that if on the first application for a certificate under sub-s. 2 the application were refused there would be no appeal from such a refusal. But it is said that when once such a certificate has been granted, it becomes part of the justices' licence, and that a refusal to renew it is a refusal to grant a renewal of the justices' licence and therefore appealable. In my judgment that argument is unsound. The holding of a justices' licence is a condition precedent to the application for and the grant of a certificate under sub-s. 2; it is only the holder of a justices' licence that can apply for and obtain such a certificate entitling him to the special privileges referred to in s. 3, showing clearly that those privileges do not in any sense form part of the justices' licence itself. I put to Sir Leslie Scott during the argument: that supposing a licence holder were to apply to the justices at their annual meeting for a renewal of his licence and also for the renewal of a certificate under sub-s. 2, and the justices were to deal first with the application for the renewal of the licence (as I think they would be bound to do) and were to grant such renewal, and were then to consider the question whether they should grant a certificate under sub-s. 2, and were to come to the conclusion that they were not satisfied that the premises complied with the necessary requirements and decided to refuse a certificate, could it possibly be said that the justices had refused to renew the justices' licence within the meaning of s. 29 of the Act of 1910? In my judgment it clearly could not. It would be misconstruing s. 29 of the 1910 Act to hold that a refusal to grant a certificate under s. 3, sub-s. 2, of the 1921 Act amounted to a refusal to grant a renewal of the justices' licence. Under s. 16 the renewal of a justices' licence means the grant of a justices' licence "at a general annual licensing meeting by way of renewal of a similar licence which is in force in respect of the premises at the date of the application." In the present case such a licence was in fact granted, and indeed had to be obtained by the licence holder before he was in a position to apply for the privileges mentioned in s. 3 of the Act of 1921.

For these reasons, as well as those given by my Lord, and by the learned judges in the Court below, I agree that this appeal fails.

SLESSER L.J. I agree that this appeal fails. Under sub-s. 2 of s. 3 of the Licensing Act, 1921, the licensing justices have refused to certify that the premises in question are so structurally adapted and bona fide used as to give to the licensee the benefits of an extension of the permitted hours given by sub-s. 1 of that section. An appeal was made from the refusal of the licensing justices to allow that certificate to the court of quarter sessions, who entertained the appeal. It was then said, on application for a certiorari to the King's Bench Division, that the court of quarter sessions had no jurisdiction in the circumstances to hear that appeal. It is clear, as Lord Westbury said in *Att.-Gen.* v. *Sillem* (1), that "the creation of a new right of appeal is plainly an act which requires legislative authority." Sir Leslie Scott says that the legislative authority in the present case is to be found in s. 29 of the Licensing (Consolidation) Act, 1910, which provides that any person who thinks himself aggrieved by the refusal of the licensing justices of any licensing district to grant a renewal of a justices' licence may appeal to quarter sessions. Therefore, it becomes necessary, in order to support the right of appeal, to say that what was here done by the licensing justices was the refusal of a renewal of a justices' licence.

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(1) (1864) 10 H. L. C. 704, 720.

By s. 1 of the Licensing (Consolidation) Act, 1910, it is provided that "an excise licence under which intoxicating liquor may be sold by retail shall not be granted except to a person who holds a justices' licence granted in accordance with this Act." There are many other sections in the Consolidation Act dealing with the conditions under which justices' licences may be granted, and the effect of their being so granted. Up to the time of the passing of the Act of 1921, the problem which we have here to consider could hardly have arisen, because by s. 16 of the Act of 1910 it is stated: "The renewal of a justices' licence means the grant of a justices' licence at a general annual licensing meeting by way of renewal of a similar licence." Apart from the Act of 1921, it is clear to my mind that there was on the last application to the justices in this case a licence given similar to that which the appellant had enjoyed in the past, so that so far from the justices refusing the renewal of a licence, they in fact granted the renewal of a licence.

It is said that under the Act of 1921 a different position had arisen. It is quite true that under s. 3, sub-s. 2, of that Act, the justices had given a certificate, as I have already stated, that the premises were structurally adapted and bona fide used or intended to be used for the purpose of habitually providing refreshment. That they had done, and that they now refuse to continue. So it is said that the grant of the certificate was something, as I understand it, inherent in the licence, and that any future licence which has not attached to it that beneficial certificate is a licence the renewal of which has been refused.

On that I would observe this. Sub-s. 2 of s. 3 does not in itself confer any specific right to sell liquor for specified hours at all. All it does is to provide that the whole of s. 3 is only to apply to licensed premises or clubs which satisfy the conditions of sub-s. 2. The effect of granting the certificate or of the satisfaction of the justices—it matters not which—under sub-s. 2, is to bring the licensed premises—not the licensee, but the licensed premises—within the ambit of the section, and thereby to confer upon the holder of the licence the right, if he elects, to keep the premises open for an hour as if an hour were added at the end of the permitted hours in the evening. In my view that right, which is dependent upon the licensed premises coming within the section, is something quite other than the licence itself. Although the Acts of 1921 and 1910 are to be read as one, the Act of 1910 is concerned with the granting of justices' licences, and the Act of 1921 is primarily concerned with the limitation of hours, which is a different subject-matter; and the permitted hours are varied and increased, if the person can bring himself within s. 3. But that is not to say that it is a part of the licence, nor is the refusal to grant a certificate under sub-s. 2 such an act as would justify the Court in holding that there had been a refusal of a similar licence within the section of the earlier Act which gives the right of appeal.

There is one other matter which leads me to think that this appeal ought not to be allowed. In the latter part of sub-s. 3 of s. 3 it is contemplated that the permission which is given in the first sub-section to keep the premises open for an hour longer than the permitted hours may be brought to an end by the holder of the licence on his giving not less than fourteen days' notice in writing, "before the expiration of any licensing year to the superintendent of the police"—not to the licensing justices—"that he intends to cease to avail himself of the provisions of this section, in which case the said provisions shall cease to apply at the end of that year." So that if it be true that the permission to keep open for the extra hour is part of the licence, it would appear that it may be deleted from the licence not by application to the justices but by an executive act of the police. That strengthens the view that this is ancillary and additional to the licence—merely giving extra powers to remain open. If that be so, I think that the section which gives the right of appeal is not appropriate to affect the subject-matter of this appeal. As Mr. Roland Oliver has pointed out, there are many matters in which the licensing justices may act on which there is no right of appeal. This, I think, is one of them, and for want of there being any power to bring this appeal, I think the quarter sessions acted without jurisdiction, and that the Divisional Court were right in holding that the rule should be made absolute.

Appeal dismissed.

Solicitors for the appellant: *Finnis, Downey, Linnell & Chessher.*

Solicitors for the Commissioner of Police: *Wontner & Sons.*

H. C. G.

THOMPSON (INSPECTOR OF TAXES) *v.* TRUST AND LOAN COMPANY OF CANADA.

C. A.
1932
Jan. 19, 20.

Revenue—Income Tax—Financial Trust Company—Temporary Investment—Treasury Bonds—Purchase cum Coupon—Simultaneous Sale ex Coupon—Receipt of Interest subject to Deduction of Income Tax—Whether Net Interest to be brought into Account under Sch. D—"Profits or gains arising or accruing . . . . from any trade"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

A company carrying on business as a loan and finance company had dealings in the course of this business in stocks, shares and other securities. They bought Treasury Bonds cum coupon and at the same time sold bonds of the same nominal value ex coupon. By cashing the coupons detached they received interest on the bonds less income tax deducted under Sch. C:—

Held, that the net interest received by the company having been taxed under Sch. C could not again be brought into account for the purpose of the assessment of income tax under Sch. D in respect of the profits or gains of the company's business.

Decision of Rowlatt J. (ante p. 283) affirmed.

APPEAL from the decision of Rowlatt J. (1) on a Case stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax.

The Case is fully set out in the report of the hearing before Rowlatt J. (1), and the following is a shortened statement of the facts.

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(1) Ante p. 283.

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The Trust and Loan Company of Canada, which had been incorporated in Canada in 1843, carried on business as a loan and finance company, and in the course of that business had dealings in stocks, shares and securities. The head office of the company was in London, and the company was admittedly assessable to income tax under Case I. of Sch. D to the Income Tax Act, 1918, in respect of the profits arising from the business, including profits from the realization of and dealing in investments. The present appeal related to assessments for the years ending April 5, 1928, and April 5, 1929.

The bulk of the company's money was invested in Canada, but the company also had temporary investments varying from half a million to a million pounds.

The sole question in the case related to certain 5½ per cent. Treasury Bonds (1930) forming part of the temporary investments, which were purchased and sold by the company in the years in question in the following circumstances:—

The 5½ per cent. Treasury Bonds (1930), which were repayable on May 15, 1930, were quoted on the Stock Exchange, a purchaser of the bonds being required to pay as an addition to the market price a sum equal to the amount of the accrued interest on the bonds from the last interest date to the date fixed by the contract for settlement.

During the years material to the appeal the company had entered into a number of transactions for the purchase cum coupon and sale ex coupon of 5½ per cent. Treasury Bonds (1930). On every day on which a contract to buy bonds cum coupon was made a contract was also made with the same broker to sell bonds of the same nominal value ex coupon.

Each of the two corresponding buying and selling contracts fixed the same date for settlement, that date being fixed by the company as near as possible to the date on which the coupon to be detached from the bond bought by the company was due for encashment. Every purchase was completed by the broker delivering to the company at its office bonds with coupons attached. The coupons next due to be paid were detached by the company, and the sale ex coupon was completed by the company handing back the bonds to the broker.

The company subsequently cashed the detached coupons and retained the money, being a half year's interest on the bonds less the amount of income tax deducted therefrom. The income tax was deducted from the proceeds by the bank encashing the coupons in accordance with Sch. C of the Income Tax Act, 1918, r. 1 (*b*) and (*c*), of the rules as to interest payable out of public revenue.

The assessments under Sch. D of the company's profits or gains had been made on the footing that the net sum received by the company in respect of the coupons detached was properly brought into account as a profit or gain taxable under that Schedule.

It was contended on behalf of H.M. Inspector of Taxes (inter alia) :—

(*a*) That the proceeds of the coupons detached by the company from the Treasury bonds were not income of the company which had been taxed by way of deduction.

(*b*) That the net amount received on cashing the coupons (i.e., after deduction of income tax) was merely a receipt of the company's business which had to be added to the selling price of the bonds, in order to arrive at the profit or loss made on the purchase or sale of the bonds.

(*c*) That in computing the profits arising to the company from the transactions above described for the purposes of Case I. of Sch. D, the amounts realized by the company on the sale of the bonds ex coupon plus the net amount of the interest received by the company in respect of the coupons detached as aforesaid after deduction of income tax should be treated as receipts, and there should be deducted therefrom, in order to arrive at the profit (if any) arising from the transaction, the amount paid by the company for the bonds cum coupon.

The Special Commissioners found that the sums received by the company in respect of the coupons represented interest upon which tax had been paid by the company under Sch. C, and they allowed the company's appeal against the assessments in principle, but adjourned the case for the amounts of the assessments to be agreed between the parties.

The sole questions for the determination of the Court were :—

(1.) Whether the coupons detached as aforesaid from the Treasury bonds or the proceeds thereof were to be regarded as income of the company taxed by way of deduction, or

(2.) Whether in computing the profits of the company under Case I. of Sch. D the net proceeds of the coupons (being the value thereof less the income tax deducted therefrom) should be added to the sale price of the bonds sold ex coupon in order to arrive at the profit or loss arising from the purchase of the bonds cum coupon.

Rowlatt J. held that the net interest received by the company on the bonds, having been taxed under Sch. C, could not again be taken into computation for the purpose of assessment of the company to income tax under Sch. D.

The Crown appealed.

Reginald Hills (*Sir William Jowitt A.-G.* and *J. H. Stamp* with him) for the appellant. In these transactions, a comparison of the cost price and sale price of the bonds always shows a loss, but it is contended that the value of the coupons detached must be taken into account in the trade receipts of the company. The transaction takes place before the coupons become payable, so that the money received in respect of them is in the same position as payment on a cheque and does not bear the character of interest which has already borne tax under Sch. C.

[LORD HANWORTH M.R. Every subject-matter falls to be taxed under the appropriate schedule, and interest payable out of public revenue is expressly taxable under Sch. C.]

When the coupons are cashed, the net sum received is not part of the company's income which has already suffered tax by deduction under Sch. C. It is merely part of the sale price of the bonds. It could no longer be treated as interest after the company sold the bonds. Thus, if a mortgagor paid his tailor's bill by assigning to him interest payable under a mortgage, the sum received in respect of that interest would not be interest in the tailor's hand but part of his trade receipts taxable under Sch. D: *Inland Revenue Commissioners* v. *Holder.* (1)

The money received in respect of the coupons here was not income of the company but income of the ultimate purchaser of the bonds. The transaction in this case was not an investment in securities but a mere deal in coupons. The process of buying and selling the bonds was necessary only because the Stock Exchange does not allow coupons to be sold without the bonds. Regarded as a dealing in coupons, it was clear that the net value of the coupons to the company must be brought into account on the credit side of their profit and loss account and against the cost of the coupons, which in this case was the difference between the purchase and sale price of the bonds.

A. M. Latter K.C. and *Roland Burrows* for the company. It is fallacious to say that a profit of the company escapes tax unless the net sum received in respect of the coupons is brought into account for the purpose of assessment of the company's profits or gains under Sch. D. The appellant's contentions involved a two-fold breach of income tax law, (1.) by treating as assessable income a sum received after the deduction of tax, and (2.) by levying tax twice on the same subject-matter under different schedules. The first question raised by the case must be answered by saying that the proceeds of the detached coupons were income of the company taxed by way of deduction under Sch. C, r. 1. That rule made it clear that the person legally entitled to the interest was the person paying the tax on it, a view which received support from *Wigmore* v. *Thomas Summerson & Sons, Ld.* (2); *Inland Revenue Commissioners* v. *Oakley* (3); and *Inland Revenue Commissioners* v. *Roberts.* (4) These cases showed that upon the sale of a security the ownership of the interest becoming payable was a matter of contract between the parties and did not depend on the ownership of the security at the date when the interest fell due.

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(1) [1931] 2 K. B. 81.
(2) (1925) 9 Tax Cas. 577.
(3) (1925) 9 Tax Cas. 582.
(4) (1927) 13 Tax Cas. 277.

In regard to the second question raised by the Case, the purchase of a bond did not, as the Crown contends, effect the purchase of two things, but only one—namely, the bond with all its rights. It is true that there were two possible aspects of profit: (*a*) by way of interest, and (*b*) by way of resale, which commercially might be regarded as one; but the Income Tax Acts prevented such a view being taken under them. There was only one tax, it was true, but it was assessed in compartments under Sch. C and Sch. D. That portion taxed under Sch. C could not be taxed again under Sch. D, for that would involve double taxation. There is no evasion of tax here. The profit to the company arises from their getting the turn of the market. So many super tax payers are anxious to sell cum coupon and buy in again ex coupon that the price does not fall the full amount of the coupon. In treating the net income received in respect of the coupon as taxable income under Sch. D the Crown are seeking to act in a way contrary to the principle of *Ashton Gas Co.* v. *Attorney-General* (1), which decided that it was the gross amount before deduction of tax that was the income of the recipient. This shows the fallacy in the Crown's contention, for obviously a sum already deducted for tax could not be made the subject of further taxation. In *Fry* v. *Salisbury House Estate, Ld.* (2), it was decided that the Crown have no option between the Schedules of the Income Tax Act, 1918, but must tax under the Schedule appropriate to the subject-matter; and further that a tax under the appropriate Schedule exhausted the tax that the particular portion of income could bear. To accept the Crown's contention on the second question raised by the Case would be contrary to that principle.

The Crown are really now asking the Court to treat the transactions in question as dealings in coupons, but no such contention has been put forward in the Case. Such a contention is one for which there is no material available.

(1) [1906] A. C. 10.

(2) [1930] A. C. 432.

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of
Canada.

The thing bought in all these transactions were bonds with all their rights. Nor is the Crown injured, for though what was bought as one whole may perhaps be said to be realized in two different ways, none of the receipts escape taxation, the one being taxed under Sch. C and the other under Sch. D. It is impossible in principle to split up the consideration as suggested: *Inland Revenue Commissioners* v. *Forrest* (1); *Inland Revenue Commissioners* v. *Oakley*. (2)

Reginald Hills in reply. The real question here is what tax the company has to pay on the profits of its business, and the Crown's contention is that it is not right to treat as a loss of the business the difference between the purchase price of bonds cum coupon and their sale price ex coupon without taking into account the value of the coupons detached. The essence of the transactions in question is that there is no investment in bonds, but merely a purchase of coupons. This case is not affected by *Fry* v. *Salisbury House Estate, Ld.* (3) It is not being sought here to impose an additional tax on the net interest received, but to bring that into account to reduce an apparent loss: compare *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (4) and *Collyer* v. *Hoare & Co.* (5) There must be set against the purchase price of the bond cum coupon the total amount that its component parts realized in order to see what profit or loss occurred. For commercial purposes what is bought is the bond and the amount of the coupon, less tax, so that no question of double taxation arises. The coupons were not income in the hands of the company. They were the income of the ultimate purchaser from the company. The tax is always on the holder of the bonds. The effect of the company's transaction was to acquire so much money—namely, the net amount of the coupons. It is just as if the company had acquired a cheque for that net amount.

[Romer L.J. Supposing the company had bought cum coupon in one year and sold ex coupon in the next year of assessment, it would not be suggested that in that next year the difference between the buying and selling price could not be brought into account as a loss.]

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(1) (1924) 8 Tax Cas. 704.
(2) 9 Tax Cas. 582.
(3) [1930] A. C. 432.
(4) [1915] A. C. 433.
(5) [1931] 1 K. B. 123.

That is so, but that is a totally different case. Here the bonds only belonged to the company momentarily, and the essence of the transaction was a purchase of coupons.

LORD HANWORTH M.R. In this appeal I agree with the decisions of the Commissioners, and of Rowlatt J., and the appeal will be dismissed. [His Lordship then stated the facts:] If the type of transaction to be considered in this case had been one in which the purchase of bonds cum coupon was made at one date and the sale ex coupon at another date, distant in point of time by some months, or even by a year, so that the purchase and sale fell into different income tax years, I think Mr. Hills would not have found himself able to suggest that the company would not have been entitled for the purpose of the taxation of their profits or gains under Sch. D to set off the sum received on the sale ex coupon against the sum which had been paid for the bonds cum coupon. He would have admitted that, for practical purposes, no nice adjustment of accrued interest would have been made, just as, in the illustration suggested by Romer L.J. during the arguments, it would not be practicable as between tenant for life and remainderman to make an adjustment to overcome the disadvantage which might be suffered by the one or by the other, according as a sale or purchase is made of a security full of dividend and another security purchased or sold not full of dividend. So that Mr. Hills' point is really that there is something exceptional in this case arising from the fact that the purchase and the sale took place practically at the same time. As Rowlatt J. said: "If the purchase and sale of these bonds had been separated by a considerable interval of time, the accounts would properly have been made out as regards the coupons cashed during the interval in the form that the respondents have adopted here. Why," he asks, "is a different result to follow because the interval has been one of only a few hours or even minutes?" In truth and in fact, the answer, if answer it be, can only be that the Crown wish to treat this as a case of purchasing coupons and coupons only, a transaction such as is not permitted by the rules of the Stock Exchange.

I come now to consider what is the result of the company's operation, looking a little more closely at the Income Tax Act. It will be remembered that Sch. C deals with tax which is to be "charged in respect of all profits arising from interest, annuities, dividends, and shares of annuities payable out of any public revenue"; and the rules which are attached to that Schedule provide that the tax is to be deducted by the Bank of England and retained for the purposes of the Act. The retaining of the amount is to be deemed payment of the tax by the person entitled to the interest, and to be allowed by him on receipt of the residue thereof. The deduction which is made by appropriate Commissioners, who are neither the General nor the Special Commissioners, is received by them as a sum due and received from the holder of the coupon. There are some cases in which, at the time of the receipt of the money due in respect of a coupon, the beneficial interest in it has, by the terms of the contract between the man who received the money and the man to whom the bond has been sold, passed to the purchaser, and the recipient then has to hand the sum received over to the purchaser. But, prima facie, the person who is entitled to receive the value of the coupon is the holder. *Roberts'* case (1) is an illustration of the person who was the legal and beneficial owner of shares at the date when the dividend on them was declared directing payment of the dividend to the person from whom they were purchased ex dividend as a creditor. It was held that the dividend was not paid over as part of the purchase price, as the shares were sold and purchased ex dividend, and so that the dividend was the vendor's income for super tax purposes.

The first question propounded in this case is: Whose income were these coupons? Whose income was the cash received for the coupons when they were encashed? In order to make the matter plain, I asked Mr. Hills to use these terms: the seller of the bond, the company, and the ultimate purchaser; and Mr. Hills took the view that the money received for the coupon was the income not of the company which encashed it but of the ultimate purchaser to whom the bond had passed. I cannot understand that. It was sold to the ultimate purchaser ex coupon at a price which allowed for its being ex coupon, and I cannot understand how he could have any title at all to something which, by the very terms of the bargain, he had not bought.

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(1) 13 Tax Cas. 277.

That being so, it seems plain that the answer to the first question propounded must be that the coupons detached from the Treasury bonds which were sold ex coupon are to be regarded as the income of the company. But it is said that although these coupons have been cashed, although there has been a deduction from their cash value under Sch. C, yet some portion of that value must be brought into account again for the purpose of assessing the profits or gains of the trade of the company which are subjected to tax under Sch. D. It is said: "The company bought the bond cum coupon. They paid a larger price for it because it was bought cum coupon. It was sold ex coupon at the same time. It would not be right to set off the price of the bond ex coupon against the cost of it when purchased cum coupon without taking into account the value of what may be called the growing fruit, that is, of the coupon approaching its day of payment." And so it is said that, although tax has been paid under Sch. C on the value of the coupon, there still remains a portion of this value which ought to be brought into the trading account.

The second question propounded in the case is: "Whether in computing the profits of the company under Case I. of Sch. D, the net proceeds of the coupon (being the value thereof less the income tax deducted therefrom) should be added to the sale price of the bonds sold ex coupon, in order to arrive at the profit or loss arising from the purchase of the bonds cum coupon?"

That is the way in which the question is put; but I do not think the Court should be precluded from considering the real point. Let me look, therefore, at contentions (*b*) and (*c*) on behalf of the Crown as set out in the Case. [His Lordship read contentions (*b*) and (*c*) as set out in the statement of facts.] In other words, the Crown seek to bring back into charge something which has already met its fate under the Income Tax Acts, something that has already been dipped into by the tax gatherer and depleted to the extent of the tax deducted under Sch. C. It is the sum remaining after deduction of tax under Sch. C which, it is said by the Crown, ought to be brought back into consideration for the purpose of the estimation of income tax under Sch. D.

It looks fair enough for the Crown to say that they will only require the sum remaining after deduction of income tax under Sch. C to be brought into account. But they would have no power and no right to make such a concession. The sum that is paid and received upon the cashing of a coupon is one sum. Whether a portion of it is deflected for the purpose of payment of income tax or not, it is one sum. The *Ashton Gas Co.* case (1) is a sufficient authority for that, if authority be needed. What right has the Crown got to separate the sum paid in respect of a coupon into two parts consisting of the part taken for payment of tax under Sch. C, and the part which remains, if I may so describe it, as the value of the coupon mutilated by the removal of the tax payable? I agree with the observation made by Lord Macmillan in *Fry* v. *Salisbury House Estate, Ld* (2), that when once it is appreciated that this is the offer of the Crown, the illogicality of the whole proceeding is revealed. He says (3): "The circumstance that the Crown has proposed, in assessing the company under Sch. D, to deduct the assessments under Sch. A affords to my mind strong evidence of the illogicality of the whole proceeding."

(1) [1906] A. C. 10.
(2) [1930] A. C. 432.
(3) [1930] A. C. 470.

I think the fallacy underlying the Crown's contention arises from their wanting to say that in every case the company did not buy a bond alone, but bought two things: a bond plus a coupon not yet due. What they did buy was a bond, and the reason why they bought it was two-fold. A bond may rise in capital value, but in addition the very nature of a bond is that it shall yield its fruit in the form of the payment of interest. But what the company bought was a bond only, and not less so because it was expected that it would, like any other security, bear its fruit in the form of a dividend or the payment of interest. I think that is plain from *Wigmore* v. *Thomas Summerson & Sons, Ld.* (1), where the matter is put very simply by Rowlatt J. He says (2) in that case, which related to War Loan on which there was to be an interest payment: "To my mind it is absurd to say a person is paying 5000*l.* in March for 5000*l.* to be paid in June." Those were the figures of the interest payment which would arise upon the particular purchase in June. "He does not do it; therefore there will have to be in any case a valuation of the amount of accrued interest that has been sold. The truth of the matter is that the seller does not receive 'interest,' and 'interest' is the subject-matter of the taxation. He receives the price of the expectancy of interest."

If then the company's purchase was of bonds which in the ordinary course would bear fruit, they are entitled for the purposes of Sch. D to set against the price paid for the bonds the price received for them. It may seem at first sight as if something more ought to be brought into account, as if for the purposes of an assessment under Sch. D that was too simple a way of looking at the transaction and that something more ought to be brought into account; but income tax is charged upon the subject by the Income Tax Acts. It may well be that the system is not perfect, that it is not entirely a coherent whole, yet the Court has to see whether or not any other subject-matter is brought into charge under the code provided by the Income Tax Acts.

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(1) 9 Tax Cas. 577.

(2) 9 Tax Cas. 581.

The reason why the *Salisbury House* case (1) has been referred to is not because of an analogy in the facts, but because of the important demonstration in that case of the general principle underlying the Income Tax Act, 1918. Lord Dunedin there makes it plain that income tax as it is imposed under this Act is one tax to be recovered in a particular manner in respect of each particular property and in accordance with the particular circumstances; and Lord Atkin, dealing with the matter in a manner which is a little closer to this case, says (2): "In my opinion it makes no difference that the income so derived forms part of the annual profits of a trading concern. For the purpose of assessing such profits for the purpose of Schedule D the income so derived is not to be brought into account," and later (3): "Similarly I am of opinion that income derived by a trading company from investments of its funds, whether temporary or permanent, in Government securities must be taxed under Schedule C, and cannot for the purposes of assessment under Schedule D be brought into account." Then again he says (4): "I find no ground for assessing the taxpayer under Schedule D for any property or gains which are the subject-matter of the other specific Schedules."

If the Income Tax Schedules leave out some form of income which is not taxed under any of them, that is a matter for the Legislature to remedy. As Lord Macmillan says (5): "If the measure is an imperfect one and when applied does not ascertain the actual income derived from the property so much the worse for the revenue. Discrepancies one way or the other between actual income and statutory income for tax purposes are familiar features of income tax law."

In the present case it is plain that this subject-matter of tax, coupons on Government bonds payable out of the Government funds, has got to be taxed under Sch. C. It cannot be taxed under any other Schedule. When the total sum received out of public revenue has been subjected as a totality to the incidence of tax under Sch. C, it is removed from being taxed under Sch. D, for Sch D in terms provides that it is only to apply under Case I. (which applies here) "in respect of any trade not contained in any other Schedule." Further, it was the gross cash value of the coupons belonging to the company—that whole sum, which, as *Ashton Gas Co.* v. *Attorney-General* (1) shows, cannot be divided up —that was the company's income and was subjected to tax under Sch. C, and after that it is immune from the incidence of tax under Sch. D. To say that another system might be adopted, more perfect in its accountancy, more perfect in showing true profits or the like, is really nihil ad rem. What is taxed, as has so often been pointed out, under the income tax is nothing that is real; it is the statutory income measured in a particular way; and many subjects are fully conscious of the fact that when income tax has been charged against them, it is upon an income which from a practical point of view has never reached their own hands. Therefore, the case is not to be tested by more perfect accountancy, but by asking whether money can be brought into charge under Sch. D which has already paid its tax under Sch. C. When once this is realized, and that the Revenue is offering only to bring into tax under Sch. D the net amount received by the company in respect of the sum which has been appropriately taxed by deduction under Sch. C, it becomes clear that it is being sought to bring into account, for the purpose of taxation under Sch. D, something which falls entirely outside it, because it is within Sch. C. Rowlatt J. has said in the last part of his judgment: "But equivalence will not do. The Crown cannot treat a transaction which has its own character for income tax purposes as if it were something of a different character, because in money result the two would come to the same thing." Here, in my judgment, the essence of each transaction is the purchase and sale of a bond; between the purchase and sale there is the appropriation to the company of

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(1) [1930] A. C. 432.
(2) Ibid. 454.
(3) [1930] A. C. 456.
(4) Ibid. 457.
(5) [1930] A. C. 467.

(1) [1906] A. C. 10.

a coupon ; that is a part of their assets which is subjected to tax in a particular way—namely, under Sch. C ; and, having been subjected to tax, it is immune from the other Schedules.

For these reasons, it appears to me that the contention of the Crown cannot be upheld, and that the appeal must be dismissed with costs.

Greer L.J. I have come to the same conclusion, but, as must have been apparent during the course of the argument, not without having encountered considerable difficulties on the way.

As I understand the substance of the claim by the Crown, it is this : "By reason of the fact that we are entitled to tax the taxpayer under Sch. C upon the total amount of the interest on the bond, we are relieved from considering any question as to whether he has been put to any loss or any expenditure in order to enable him to get that income."

As I understand the contention on behalf of the company, it is this : "It is quite true that we are liable to be taxed under Sch. C for the total of the dividend payable on the coupon; not for the dividend less the tax, but for the total of that dividend ; and we do not in any way quarrel with that tax, but we contend that that sum of income is not to come into our accounts when they are being made up for the purpose of Sch. D." But they also say : "We are in business for the purpose of buying and selling securities. You cannot ascertain our profits or gains for the purposes of taxation under Sch. D without taking into account the expenses of our business ; and one of the expenses of our business is the sum of money that we have expended from time to time in order to get the right to the interest for which we are taxed under Sch. C." To take a concrete case, they say : "On a certain date we bought a bond, the face value of which was 100*l.* A day or two later we would become entitled to receive on that bond a sum of 5*l.* 10*s.* by way of dividend, but we knew quite well that the Bank in paying that sum would deduct and pay for us the income tax that we became liable to pay on it. But, in order to put ourselves

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in a position to obtain that income, we bought the bond, and, as all we desire to have is the income on that bond, we have sold the bond ex coupon and incurred a loss of 2*l*. If we had not sold the bond at that time, but had received the interest less tax as the owner of the bond, and sold it at a subsequent period at a loss, nobody could contend that that loss would not have been a proper deduction from the profits or gains of our business for the purpose of assessment under Sch. D. It makes no difference that we in fact sold the bond and incurred a loss on the whole transaction before we received the income on the coupon."

On consideration, I think that is a sound argument; and it has this advantage, in my view, that the result is a just one, and prevents this company from being taxed again upon income which has already borne tax.

I agree that the income of 5*l*. 10*s*. is not to be brought into the account for the purposes of taxation under Sch. D; but it does not follow that the loss incurred to enable the company to earn that income of 5*l*. 10*s*. which is taxed under Sch. C should not be taken into account in the company's return under Sch. D.

Dealing with the case on those lines, I think the judgment of the learned judge below, following the views expressed by the Commissioners, was right. In stating the case the learned judge says: "In these circumstances they" (that is, the company), "in making up their accounts for Sch. D, treated the cost of the purchase as an expenditure and the price obtained on the sale as a receipt. They did not bring in the sum of interest less tax received upon the coupons, which of course (neglecting any charges for brokerage) was the same amount as the difference between their buying and selling prices." I agree that they do not bring in the sum of interest which they received on the coupon; but they do bring in, and I think they are entitled to bring in, the expense they have been put to in their business in order to put them in a position to obtain that interest from which the Government have deducted tax. I am satisfied that the Government have in this case got all the tax that they are

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entitled to. It may be that, in some instances, the result of the accounts, if a full account were taken, might be that the Government received more tax than they are entitled to; it might be that in some cases they received less; but they have received what the statute gives them, and, having got that, they are not entitled to complain.

I would answer the two questions that are put in the Case in the same way as my Lord has answered them. I agree that we are not necessarily concluded by the questions that have been put. We are entitled to ask ourselves, taking the whole of the facts which are stated in the Case together: Ought the taxpayer to have imposed upon him any further tax, or has he been sufficiently taxed? But I rather protest against the idea that it is right to go before the Commissioners, to frame in the way these Cases are framed questions for the determination of the Court, and then to come to the Court of Appeal, and say: "We are not content with those questions. We want to make quite a different case." If it were thought reasonable to allow the Crown to do this I should be inclined to say that the result would be that the matter must go back to the Commissioners to consider and deal with the new arguments and the additional facts that might be material to those arguments. I agree that that is not conclusive, but I prefer, at any rate in this case, to say that the sole questions which have been raised are questions which ought to be answered in favour of the respondents in this case. The judgment of the learned judge below ought to be affirmed.

Romer L.J. I have arrived at the same conclusion. The case that we have to determine arises out of certain transactions entered into by the respondent company on the Stock Exchange in relation to the sale and purchase of Treasury bonds of 1930, which transactions, to me at any rate, are mysterious and unintelligible. The transactions were of this nature: shortly before the date on which the coupons attached to the bonds became payable the company would buy a large block of those bonds with coupons attached and would, on the same day, and for all that I know to the contrary to the same person, sell those bonds ex coupon, that is to say, without the coupon shortly to fall due. Those transactions took place in the years 1927 and 1928, and the figures relating to them are set out in the Case. The effect of the transactions that took place in the year 1927 has been very conveniently summarized for us by Mr. Burrows, and it appears that the gross value of the coupons which were retained by the company on the resale of the bonds amounted to 83,682*l.* 10*s.* The difference between the price paid for the bonds cum coupon and the price received for the bonds ex coupon was 75,434*l.* 7*s.* 5*d.*, which was only 8248*l.* 2*s.* 7*d.* less than the gross amount of the coupons. If the gross sums represented by the coupons had been paid without deduction of tax there would have been a profit on the transaction of 8248*l.* 2*s.* 7*d.* therefore; but, in point of fact, we know that the coupons are not paid free of tax, and that income tax is deducted by the agent of the Government before paying the coupons. The result of that is that as the deduction from the 83,000*l.* was some 17,000*l.*, there was a net loss to the company on the transaction of about 9000*l.* That is the reason why I say these transactions are mysterious and, to me, unintelligible. There may be some explanation of them; there must be some explanation of them which is not present to my mind. But, however unintelligible and mysterious the transactions may be, we have to see what effect they have from the tax point of view on the company. It appears that in the City of London, and no doubt elsewhere, there are people whose business it is to deal in coupons; that is to say, they buy up coupons before they are due for payment (it may be many weeks before they are due for payment), and then they take those coupons which are detached for that purpose from the bonds and handed over to them by the owner of the bonds, and present those coupons for payment, and receive the net proceeds, that is to say, the face value of the coupons less tax. Mr. Hills says, and I am inclined to agree with him, that in such a case the coupon in the hand of the dealer in coupons is not in any sense his income at all. He has bought from the holder of the bond something which would represent the income of the holder of that bond, had it not been sold. What he has really acquired from the holder of the bond is not income, but the right to receive a sum of money which, if received by the holder of the bond, would be his income, but which is really merely a sum of money ascertained by deducting from the face value of the bond the income tax payable in respect of it. In that case the Government, of course, would be paid tax in respect of the coupon, not because it formed part of the income of the coupon dealer, but because it formed part of the income of the holder of the bond. When it came to taxing the profits of the coupon dealer he would, on one side of his account (the debit side) set out the sums he paid for the purchase of the coupons, and, on the other side, he would credit himself with the net amount received in respect of the coupons, and, subject to any question of interest, the balance would be the profit derived by him from dealing in the coupons.

Now take the case of a company whose business it is to deal in the sale and purchase of bonds and other securities. A company makes a bona fide purchase of bonds cum dividend or cum coupon, and some time afterwards, before the coupon is cashed or the dividend is payable, sells the bond ex coupon or ex dividend. It has been held by this Court that in such a case the company, when it receives the proceeds of the coupon or the dividend, receives them as its own income. That is the decision in *Inland Revenue Commissioners* v. *Roberts*. (1) Therefore for the purposes of its accounts it would treat itself properly as having received the gross amount of the coupons or dividend.

Let me give a simple illustration. A company such as I have indicated buys a bond in respect of which a coupon will be paid on July 1. It buys that bond cum coupon on May 31 for 104*l.*, let us say, of which it may be said that 102*l.* is the value of the bond ex coupon and 2*l.* represents the accruing interest. It sells the bond ex coupon on June 30 for 102*l.* It receives on the following day whatever is the amount of the interest, and it is entitled prima facie to distribute that amongst its shareholders as dividend subject to this, that it will be observed that the company has made a capital loss of 2*l.* It is 2*l.* out of pocket on its capital account. It has paid out 104*l.* and has only got back 102*l.* If a company could distribute as part of its profit among its shareholders that dividend received on July 1 without making any provision in relation to that loss of circulating capital it would, in effect, be paying a dividend out of capital, and, therefore, in its accounts it very properly debits itself with the 2*l.* as being loss on sale and purchase of the bonds. Whether or not the sale ex dividend takes place in the same year as the purchase cum dividend takes place seems to me to be wholly immaterial. If the sale takes place in the following year of assessment the company would in the year in which it received the dividend very properly treat that dividend as part of its profits and distribute it with others amongst its shareholders, but the next year when it sells at 102*l.* (say) it has got to bring in and debit itself with 2*l.* loss on capital. If the income tax remains the same the result to the Crown, of course, is precisely the same as though it had debited itself with that in the year in which it received the 2*l.* Mr. Hills, as I understand it, does not dispute that in a case such as that I have mentioned the company would be entitled for the purpose of ascertaining its profits under Sch. D to debit itself with that capital loss represented by the difference between the 104*l.* and the 102*l.*; but he says (and I think his case must rest on this) that this is not a case of a bona fide sale and purchase of bonds at all, but a case falling under the first category that I have already mentioned, the category of dealers in coupons. If he be right in saying that the transaction I have described is really nothing more or less than the purchase by the company of a coupon, I think he would be right in his contention.

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(1) 13 Tax Cas. 277.

Within which category does this case come? In my opinion, it is impossible to hold that this is a mere dealing by the company with coupons and not a bona fide transaction of sale and purchase of bonds. It is true that the fact that the sale ex coupon takes place on the very day on which the purchase cum coupon is effected gives rise, at any rate, to a suspicion that that may have been the object of the whole transaction; but there is no evidence stated in the Case to justify us in drawing the conclusion that these transactions were not bona fide, but mere cloaks to enable the company to deal in coupons. It is not stated in the Case, but we are informed that, in point of fact, a small capital profit is in a sense made. Take the case that I have mentioned of the purchase of a bond for 104*l.* Of that 104*l.*, 102*l.* may be taken to represent the purchase price of the bond without the coupon and 2*l.* the purchase price of the coupon. It is said that when the resale takes place ex coupon the bond often realizes 102*l.* 10*s.*, the reason being that people are very anxious, just before dividend days, to sell bonds cum coupon, and to buy bonds ex coupon, and in that way it is suggested to us (as I say there is no statement in the Case that this, in fact, takes place) that the company does make some profit on the sale and purchase of the bonds regarded as bonds alone without any reference to the coupons. In my opinion we are not justified by anything which is stated in the Case in coming to the conclusion that such a profit does not in fact accrue to the company; in other words, I do not think we are justified on anything stated in the Case in coming to the conclusion that this is a mere coupon transaction and not a bona fide sale and purchase of bonds.

For that reason it seems to me it is impossible for this Court to answer the first question that is submitted in the Case, except by saying that the coupons detached from Treasury bonds, or the proceeds thereof, are to be regarded as income of the company taxed by way of deduction.

For these reasons I agree that this appeal must fail.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Holmes, Son & Pott.*

H. C. G.

1931
Nov. 11, 12, 16.

ATTORNEY-GENERAL *v.* LEWIS AND BURROWS, LIMITED.

Revenue—Customs and Excise—Medicine Stamp Duty—"Original or first vendors"—"Known, admitted and approved" Properties—Medicines Stamp Act, 1812 (52 *Geo.* 3, *c.* 150), *ss.* 1, 2 *and Schedule.*

A retail chemist ordered a remedy for chest complaints to be made up by manufacturers in accordance with a formula which was contained in a well-known book of pharmaceutical formulas under the name "Chest Vapour Rub." He then put it into cartons, and sold it to the public with a label which described it as "Vapour Rub" and bore his trade mark. There was evidence that the words "Vapour Rub" alone described a class of medicines and not any individual one.

In an action brought upon information by the Attorney-General for non-payment of medicine stamp duty:—

Held, that "Vapour Rub," as described above, was not a remedy whose properties were "known, admitted and approved" within the exemption contained in the Schedule to the Medicines Stamp Act, 1812.

The "denomination, properties, qualities, virtues and efficacies" of a mixture cannot be "known, admitted and approved" unless the vendor clearly identifies them either by description or by reference to a known and accessible formula.

Action on information by the Attorney-General.

The information alleged that the defendants, who were dispensing chemists, on October 18, 1930, did sell to one Baker, at 108 New Oxford Street, in the county of London, a chemical preparation made and compounded by them to be used and applied externally for the cure of chest complaints, to wit, a pot of "Vapour Rub," contained in a carton without any cover, wrapper, label or stamp denoting that medicine stamp duty had been paid; and that the denomination, properties, qualities, virtues and efficacies thereof were not then known, admitted and approved of in the relief of any malady affecting the human body; and that by words printed on the carton and delivered with the said preparation the defendants, being the owners, makers, compounders and original or first vendors thereof, held out the preparation to the public as beneficial to the relief of chest complaints contrary to the provisions of the Medicines Stamp Act, 1812, ss. 1 and 2 and Schedule, and of other statutes relating to the revenue of excise, and had incurred a penalty of 10*l.* The defendants to this pleaded not guilty.

Stamp duties on medicines are granted by the following Acts: 42 Geo. 3, c. 56, s. 3; 44 Geo. 3, c. 98, s. 2 and Sch. B; and 52 Geo. 3, c. 150, ss. 1 and 2. The "Vapour Rub" would be chargeable with duty unless it came within the exemptions in the Schedule to the last named Act, which include "all mixtures, compositions, or preparations whatsoever," of which the "denomination, properties, qualities, virtues or efficacies," are "known, admitted, and approved of in the relief of human ailments, and which mixtures, compositions, or preparations are not" held out or recommended to the public by "the owners, proprietors, makers, compounders, original or first vendors thereof," as beneficial for the relief of human ailments.

The evidence showed that "Vapour Rub" was made to the defendants' order by a firm of manufacturers in accordance with a formula appearing in a publication well known to chemists, entitled "Pharmaceutical Formulas," and consisting of a collection of standard formulas. Exemptions from medicine stamp duty were allowed by the Commissioners under the Schedule to the Medicines Stamp Act, 1812: (*a*) where the label upon the medicine contained an indication of the ingredients, and (*b*) where the medicine was prepared in accordance with a formula in well-known books of reference, and this fact was clearly stated on the label. The ointment in this case appeared in "Pharmaceutical Formulas" under the name "Chest Vapour Rub," of which the ingredients were there given. It was supplied to the defendants by the manufacturers in bulk, and was packed by the defendants in cartons bearing the words, "Ellanbee Brand," by which term the defendants' medicines were known, together with their trade mark under the name "Vapour Rub." It was then despatched by the defendants to their branch shops for sale to the public.

Sir T. Inskip S.-G. and *Bowstead* for the Crown. Stamp duties on medicines were granted by the Acts 42 Geo. 3

c. 56, s. 3; 44 Geo. 3, c. 98, s. 2 and Sch. B; and 52 Geo. 3, c. 150. The last named statute, the Medicines Stamp Act, 1812, provides the penalty (s. 2), and is the chief Act now in force. Two classes of articles are rendered liable under the Medicines Stamp Act, 1812—namely: (1.) proprietary medicines; (2.) articles advertised as beneficial by the maker, vendor or proprietor. This case turns upon the meaning of the exemption in the Schedule, which applies to a "known, admitted and approved" remedy. The Schedule does not state by whom the preparation is to be "known, admitted and approved." The defendants admit the making of the remedy and they cannot be regarded as within the exemption, because they claim an exclusive or proprietary right in "Vapour Rub."

Even if the remedy is one "known, admitted and approved," the defendants are liable, because they are clearly the "original or first vendors." *Farmer* v. *Glyn-Jones* (1), which appears to be against us, is distinguishable. In that case a retail chemist purchased the remedy from the manufacturers and himself attached the label. He was held not to be the "owner, proprietor, original or first vendor" within 52 Geo. 3, c. 150, Schedule. But here the defendants ordered the remedy to be made for them by the manufacturers according to specification, and obviously came within the description.

Sir Albion Richardson K.C. and *Glyn-Jones* for the defendants. The article here is compounded of drugs or chemicals, as to which there is no secret either of denomination, quality or mode of manufacture. It is entered in the book of "Pharmaceutical Formulas" under the name of "Chest Vapour Rub," and the ingredients are there given. It is, therefore, within the exemption conferred by the Schedule to the Medicines Stamp Act, 1812, upon mixtures whose "denomination, properties, qualities, virtues and efficacies" are "known, admitted and approved of" in the relief of human ailments. Further, the defendants here are not the owners, proprietors, original and first vendors, within the limitation to the above exemption. It was made up and

(1) [1903] 2 K. B. 6.

sold to them by the manufacturers, who first put it on the market. The defendants are in the same position as the respondent in *Farmer* v. *Glyn-Jones* (1), and the decision in that case governs the present.

Sir T. Inskip S.-G. replied.

Nov. 16. ROWLATT J. read the following judgment: The Attorney-General seeks to recover from the defendants, who are retail chemists, a penalty under the Medicines Stamp Act, 1812 (52 Geo. 3, c. 150) for selling a bottle of a substance described as "Vapour Rub," and recommended on the wrapper for chest and throat complaints, without the article bearing the stamp required by the Act.

The question turns on whether the defendants can bring themselves within the special exemptions in the Schedule to the Act. It is said that they fail to do this in two respects. The first point made was that they were "the original or first vendors" within the words of one of the limitations of the exemption. In *Farmer* v. *Glyn-Jones* (1) it was held that a retailer buying a preparation from the wholesalers and then bottling it and affixing a commendatory label was not the "original or first vendor." The Solicitor-General sought to distinguish this case from that on the ground that here the article was ordered to be made up specially for the defendants, as appears by the correspondence; so that the position is the same (if I understand the argument aright) as if the defendants had made it themselves by their own employees on their own premises. I cannot give effect to this distinction. Though the article was ordered, the transaction was a sale as much as it was in the case referred to.

The other point was whether the substance was a "mixture, composition, or preparation" of which "the different denomination, properties, qualities, virtues and efficacies" were "known, admitted and approved of in" (to put it shortly) the relief of human ailments. The facts were that the formula, according to which this "Vapour Rub" is made up,

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(1) [1903] 2 K. B. 6.

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is to be found in the publication known as "Pharmaceutical Formulas," but under the name of "Chest Vapour Rub." "Vapour Rub," according to my view of the evidence, is a designation of the method whereby, when a substance of this kind is used, the healing ingredients which it contains are brought into operation upon the organs to be treated. The preparation is rubbed upon the chest, and acts in direct mitigation of inflammation and also gives off a vapour which is inhaled. It is a term of the same class as lozenge, pill, powder, plaster, embrocation. Substances acting in this double way have long been used, and I was told, and I accept the evidence, that people have their own particular formulas for this sort of treatment, often handed down from earlier generations in whose time there was less reliance on ready compounded medicaments. The phrase "Vapour Rub" has been invented to describe this class of article in the United States of America, from which country a particular form of it, called "Vick Vapour Rub," has been put upon the market. The term "Vapour Rub" simpliciter has not been used as describing a particular article until 1929, when the defendants began to sell the preparation now in question in the way that has given rise to these proceedings.

In these circumstances, if the defendants had described their article as "Chest Vapour Rub, P.F.1," I should have held that its denomination, properties, and so on, were "known, admitted and approved of," by reason of the circumstance that Chest Vapour Rub, with its formula, appears in that publication ("Pharmaceutical Formulas"). The point is as to the position when the compound itself is exactly described in the publication or is otherwise "known, admitted or approved of," but the article in question is not identified with it by name or specific description.

It seems to me that it is the substance sold whose properties have to be "known, admitted and approved of," not the formula according to which it can be ascertained that it has in fact been prepared, though put upon the market under some mysterious name. If this is so, it is obvious

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that the "denomination, properties, qualities, virtues and efficacies" of a "mixture, composition, or preparation," cannot be said to be "known, admitted and approved" unless it is first known what mixture is referred to. The properties of "Vapour Rub" simpliciter are not known by reason of the fact that those of "Chest Vapour Rub" are, unless it is also known that the two articles are the same. It seems to me that there is no evidence of this latter knowledge.

The Crown, therefore, succeeds on this point and is entitled to judgment for the penalty claimed with costs. I think I may add that it is high time that this mass of confused and obsolete verbiage comprising these Acts should be recast.

Judgment for the Crown.

Solicitor for the Crown: *The Solicitor for Customs and Excise.*

Solicitor for defendants: *C. H. Kirby.*

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Followed. ARAB BANK LD. *v.* ROSS [1952] 2 Q.B. 216

SLINGSBY AND OTHERS *v.* DISTRICT BANK, LIMITED.

[1931. S. 1140.]

MANCHESTER DISTRICT REGISTRY.

Banker and Customer—Cheque—Description of Payee—" A. B. per C. D."—Indorsement—Blank Space—Forgery—Duty of Drawer—Negligence—Estoppel—Ostensible Agency—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *ss.* 60, 64, 79, 80.

The plaintiffs, executors of a will, kept an executors' account with the defendants, and retained a firm of solicitors, Messrs. C. & P., who used to assist them in matters connected with their testator's estate. The acting member of the firm was one J. C. The plaintiffs in conference with J. C. decided to invest through Messrs. J. P. & Co., stockbrokers, a sum of 5000*l.* part of the estate lodged on deposit with the defendants. J. C. accordingly drew out a form of cheque for signature by the plaintiffs. It was in the form " Pay J. P. & Co. or order " and was drawn on the plaintiffs' deposit account with the defendants. The cheque was signed by the plaintiffs and left with J. C. to be posted to J. P. & Co. with instructions to invest the money. J. C., instead of posting the cheque to J. P. & Co., fraudulently inserted the words " per C. & P." in the blank space between the payees' name and the words " or order " ; he then indorsed the document with the names C. & P. and paid it so altered and indorsed into the W. Bank to the credit of a company in which he was interested and which had an account at that bank. The document was accepted without question by the W. Bank and passed through the clearing house, and the account of the plaintiffs with the defendants was debited, and that of the company with the W. Bank was credited, with the amount on the face of the document. In an action by the plaintiffs against the defendants for conversion, negligence and breach of duty :—

Held, (1.) that the cheque had been " materially altered " within the meaning of s. 64 of the Bills of Exchange Act, 1882, and was avoided as between the plaintiffs and defendants by that section, and that therefore the defendants could not rely upon s. 60 of the Act as excusing them for paying the cheque.

(2.) That for the same reason the defendants could not rely on s. 80 of the Act.

(3.) That assuming the description of the payees, " J. P. & Co. per C. & P." to be a recognized although unusual description, the indorsement of " C. & P." without any reference to " J. P. & Co." was irregular and invalid, and that the defendants were negligent in honouring the cheque, and for this reason also were not protected by s. 80, or *semble* by s. 60 of the Act.

(4.) The additions and alterations referred to in the proviso to sub-s. 2 of s. 79 of the Act are additions to and alterations in the original crossing of a crossed cheque and not to or in the body of a cheque.

(5.) That in leaving a blank space between the names of the payees and the words "or order" the plaintiffs were not guilty of any breach of duty towards the defendants.

London Joint Stock Bank v. *Macmillan* [1918] A. C. 777 followed.

(6.) That the plaintiffs had not held out J. C. as having authority to draw cheques on their behalf so as to estop them from asserting the fact that a document drawn by him and purporting to be a cheque signed by them had been materially altered by him after signature without their authority and was a forgery.

Lloyd v. *Grace, Smith & Co.* [1912] A. C. 716 distinguished.

Slingsby v. *Westminster Bank* [1931] 1 K. B. 173 disapproved; *Slingsby* v. *Westminster Bank* [1931] 2 K. B. 583 overruled.

Judgment of Wright J. [1931] 2 K. B. 588 affirmed.

APPEAL from the judgment of Wright J. (1) in an action tried before the learned judge without a jury.

The plaintiffs were executors of the will of one Harry Turner deceased. They kept an executors' account with the defendants' Macclesfield Branch, and employed in relation to the testator's estate a firm of solicitors, Messrs. Cumberbirch & Potts, of Macclesfield, of whom the acting partner was James Cumberbirch, a man of good repute in his profession. At a meeting on December 4, 1929, at which J. Cumberbirch was present, the plaintiffs decided to invest a sum of 5000*l.*, part of the estate, through a firm of London stockbrokers, John Prust & Co., to whom J. Cumberbirch was to give the necessary instructions for the purchase of Five per cent. War Loan, 1929–1947. In pursuance of this intention J. Gumberbirch drew out a cheque in the following form:—

"No. S412626. Macclesfield, 4th December, 1929.
District Bank, Limited.
Macclesfield.
(In print) Pay (in writing) John Prust & Co. (in print) or Order (in writing) Five thousand pounds———
A/c Executors of Harry Turner.
5000*l.*———
Deposit a/c." (2)

This form was signed by three of the executors on December 4 and by Mrs. Slingsby, the fourth and last, on

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(1) [1931] 2 K. B. 588.

(2) A photograph of the cheque in counsel's brief showed that the cheque was crossed generally.

December 5. Then on the same day, instead of posting the cheque, so drawn and signed, to John Prust & Co., Cumberbirch without the authority, assent, or knowledge of any of the executors, altered the cheque by writing in the blank space between "& Co." and "or order" the words "per Cumberbirch & Potts."

Cumberbirch was the chairman of the Palatine Industrial Finance Co., Ld., a company which had an account with a Manchester branch of the Westminster Bank. The company's account was on the morning of December 5 in credit to the amount of 49*l.* On the same day Cumberbirch indorsed the executors' cheque "Cumberbirch & Potts" and took it to the Westminster Bank. There he made out a paying in slip instructing the bank to pay the 5000*l.* to the account of the Palatine Industrial Finance Co. and handed the cheque and the paying in slip to a cashier. On December 5 and 6 cheques were drawn on this account to the amount of 565*l.* and were honoured. The executors' cheque in due course passed through the Manchester clearing house. On December 7 the account of the Palatine Industrial Finance Co. with the Westminster Bank was credited with 5000*l.*, and the plaintiffs' account with the defendants was debited with the same amount. Soon after this Cumberbirch absconded. In March, 1930, his dishonesty was discovered. In May, 1930, the plaintiffs brought the action to recover the 5000*l.* wrongfully debited to their account as aforesaid.

The pleadings are very fully stated in the report in the Court below. Briefly the plaintiffs alleged that their account had been debited without authority in that there was no proper or regular indorsement of the cheque and that the cheque had been materially altered without their assent and was therefore void by s. 64 of the Bills of Exchange Act, 1882. Alternatively they relied on a conversion of 5000*l.*, and in the further alternative claimed damages for the negligence and breach of duty of the defendants in paying the so-called cheque without inquiry notwithstanding that it did not appear to be indorsed by the payees therein named.

The defendants denied that the words had been added unlawfully or that the addition was a material alteration of the cheque or that the indorsement was unlawful or irregular or made without authority; and they asserted that they had debited the plaintiffs' account in good faith and without negligence and with the authority of the plaintiffs. They also alleged that if any of the irregularities complained of had taken place they were due to the negligence of the plaintiffs themselves in allowing Cumberbirch to draw the cheque and in signing it leaving the blank above mentioned and then permitting Cumberbirch to retain it in his custody, and that these acts of the plaintiffs estopped them from denying that the cheque was their mandate on which the defendants were bound or entitled to act. They further contended that the loss of the sum claimed was due to the fraud of Cumberbirch, the servant or agent of the plaintiffs, for whose acts the defendants were in no way responsible; and lastly they relied upon ss. 60 and 80 of the Bills of Exchange Act, 1882. (1)

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(1) Bills of Exchange Act, 1882, s. 60: "When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority."

Sect. 64, sub-s. 1: "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. Provided that, Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour."

Sect. 79, sub-s. 1: "Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof."

Sub-s. 2: "Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may

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At the trial the defendants called several witnesses of long experience in the practice of banking, who said that cheques drawn in the form "Pay A. per B." were well-known, but not common; that cheques in this form were used when payments were being made (*a*) by tax-payers to the Income Tax Commissioners through the collector of taxes, (*b*) by ratepayers to the rating authority through a rate collector, (*c*) by a charterer to a shipowner through the ship's agent, (*d*) by joint stock companies paying dividends to holders of stock or shares through their bankers, and (*e*) by a purchaser of real property paying the purchase money to the vendors through their solicitors. These witnesses further stated that in their opinion cheques in this form were properly and regularly indorsed in the name of B. without any reference to A. In cross-examination the attention of these witnesses was called to a volume published by the Institute of Bankers with the authority of the Council of the Institute under the title, Questions on Banking Practice, 8th ed. (1930). The

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sustain owing to the cheque having been so paid. Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be."

Sect. 80: "Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof."

Sect. 82: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

following questions and answers were particularly put to the witnesses :—

Questions on Banking Practice, 8th ed. (1930), Question "751. A cheque is drawn payable to 'John Jones a/c A. B.,' and endorsed 'John Jones.' Is such endorsement sufficient ? Answer: No; it should state that it is an account of A. B.

"752. A cheque payable to the Greenfield Colliery Company, Ld., per John Jones, Esq., is endorsed 'John Jones.' Is this a sufficient discharge as far as the paying banker is concerned ? Answer: No, John Jones should state that he signs on behalf of the Greenfield Colliery Company. (But see 754.)

"753. A cheque is drawn payable to 'The Overseers of Knightsbridge, per A. Procter.' It is endorsed 'A. Procter.' Is this endorsement strictly correct ? Answer: No; A. Procter should state that he signs on behalf of the overseers of Knightsbridge. (But see 754.)

"754. A cheque is presented payable to Messrs. A. Smith & Co., per John Jones, Ld., and is endorsed 'p.p. John Jones, Ld., B. Brown, Director,' no reference to A. Smith & Co. being made in the endorsement. Is this correct ? Dividend charges are frequently made out in this form: 'Pay Jno. Brown, per the Lombard Bank, Ld.,' the endorsement of the Lombard Bank (containing no reference to John Brown) being accepted. Answer: Strictly, the endorsement is incorrect without reference to A. Smith & Co.; it is, however, often accepted, and the custom of paying dividend warrants, discharged by a banker as above, is a well recognized one."

The witnesses, while acknowledging the prestige and authority of the Council of the Institute, said that they did not agree with the answers. Wright J. gave judgment for the plaintiffs.

The defendants appealed.

Cyril Atkinson K.C. and *W. Gorman* for the appellants.

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1. The appellants are protected by s. 60 of the Bills of Exchange Act, 1882. They have paid in good faith and in the ordinary course of business a bill, that is to say, a cheque, drawn on them and payable to order, and are therefore deemed to have paid it in due course.

2. They are protected by s. 80 of the Act. They have in good faith and without negligence paid the cheque, which was crossed generally, to a banker—namely, the Westminster Bank, within the meaning of that section. The protection given by s. 80 to the paying bank is given by s. 82 to the receiving bank. Finlay J. has held that the Westminster Bank—i.e., the receiving bank—has acted in good faith and without negligence. (1) If they are protected, a fortiori the appellants are immune. They paid the cheque drawn in a form which, if not common, is at least a recognized form, and indorsed in a manner which in the opinion of every banking witness called is the proper and regular mode of indorsing a cheque so drawn.

3. The respondents contend that s. 80 gives no protection because the cheque was altered by Cumberbirch after having been drawn and without the assent of the drawers, and was therefore avoided by s. 64, sub-s. 1. The answer to that contention is in the proviso to s. 79, sub-s. 2: "where a cheque is presented for payment which does not at the time of presentment appear . . . . to have been added to or altered otherwise than as authorized by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act." The body of this cheque being all in one and the same handwriting did not appear to have been added to or altered in any way.

[Greer L.J. The words "to have been added to or altered" refer to the crossing of the cheque and to the additions and alterations mentioned in s. 77.]

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(1) *See* [1931] 2 K. B. 583.

Grammatically they refer to the body of the cheque and should be construed accordingly.

4. The loss of which the respondents complain was really caused by their own negligence in leaving in Cumberbirch's hands a cheque which he had drawn up with a blank left after the payee's name and thereby enabling him to add the words "per Cumberbirch & Potts." This breach of duty on their part precludes them from recovering in this action: *Scholfield* v. *Earl of Londesborough* (1); *London Joint Stock Bank* v. *Macmillan.* (2)

5. The respondents have held out J. Cumberbirch as having their authority to draw cheques on their behalf in like manner as in *Lloyd* v. *Grace, Smith & Co.* (3) the firm of solicitors held out their managing clerk as having authority to do their conveyancing work for them as their representative. Having done this, the respondents are estopped from objecting that to draw a cheque in a particular form was beyond the bounds of Cumberbirch's authority: *Lloyd's Bank* v. *Cooke.* (4)

Laski K.C., *C. Gandy* and *Corderoy* for the respondents.

Lloyd v. *Grace, Smith & Co.* (3) fails to bear the weight of the argument which the appellants would base upon it. All the conveyancing business of the firm of Grace, Smith & Co. was done by Sandells, the managing clerk and accredited representative of the firm. Clients desiring to sell estates or transfer mortgages gave their instructions to Sandells. The sole member of the firm, Mr. Smith, gave his time and attention to other occupations. It was easy to infer from this that the sale of Mrs. Lloyd's property and the transfer of her mortgage were acts done by Sandells on behalf of the firm. It would have been harder to draw the inference that those acts were not so done. That case is cited to support the contention that clients who occasionally request their solicitor to perform the ministerial act of writing out a form of cheque for them to sign, thereby warrant, either in fact or in semblance, that all instruments drafted by him and purporting to be cheques signed by them are their cheques, so that they are thereafter estopped from proving that the instruments were falsified by the solicitor after signature. The difference between the two cases lies in the regular professional work done by the firm through its managing clerk, in the one case, and the occasional service rendered by a solicitor to his clients in the other. Much more in point is *Ruben* v. *Great Fingall Consolidated* (1), where the secretary of a company entrusted with the duty of delivering to shareholders certificates of their shares signed by two directors and sealed with the seal of the company, forged the signatures of two directors to a document purporting to be a certificate of shares and affixed the seal of the company to it and obtained an advance from the persons named in the document as holders of the shares. It was held in the House of Lords that the company was not bound by this forged document.

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(1) [1896] A. C. 514.
(2) [1918] A. C. 777.
(3) [1912] A. C. 716.
(4) [1907] 1 K. B. 794.

Secondly, the respondents were not guilty of any breach of duty towards the appellants in or about the actual drawing of the cheque—namely, in leaving the blank between the name of the payees and the words " or order." A customer is not bound to take more than reasonable and ordinary precautions against forgery: *London Joint Stock Bank* v. *Macmillan* (2), per Lord Finlay L.C.; per Lord Haldane. (3) Hitherto it has not been found necessary, and it has not been usual, to draw a line through or otherwise fill up any space that may be left immediately after the payee's name. And therefore in this case, whatever may occur in future cases, the respondents cannot be charged with negligence in omitting to fill the space: *Union Credit Bank* v. *Mersey Docks and Harbour Board.* (4) Neither can they be blamed for leaving the cheque in the custody of Cumberbirch: *Smith* v. *Prosser* (5); *Lewes Sanitary Steam Laundry Co.* v. *Barclay, Bevan & Co.* (6); *Macmillan* v. *London Joint Stock Bank* (7), per Scrutton L.J.

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(1) [1906] A. C. 439.
(2) [1918] A. C. 777, 789.
(3) Ibid. 814.
(4) [1899] 2 Q. B. 205, 213.
(5) [1907] 2 K. B. 735.
(6) (1906) 11 Com. Cas. 255.
(7) [1917] 2 K. B. 439, 455.

It follows that there is nothing to estop the respondents from asserting the fact that the appellants have paid away 5000*l*. of their money upon a forged cheque. The appellants can only confess and avoid. They cannot rely upon s. 60 of the Bills of Exchange Act, 1882, because, being a forgery, the alleged cheque is not a bill within that section. It is a mere nullity. The addition of the words "per Cumberbirch & Potts" was a material alteration whereby the amount of the cheque instead of going direct to John Prust & Co. was made to pass through the hands of Cumberbirch & Potts; and, therefore, by s. 64, sub-s. 1, the cheque was avoided.

Neither will s. 80 avail the appellants, first, because before it reached them the document had ceased to be a cheque, and secondly because, although they paid upon it in good faith it cannot be said that they did so without negligence. It was drawn in an unusual form which called for explanation. Moreover, notwithstanding the evidence of the bankers who were called, the indorsement was irregular and invalid according to law. The mandate upon the face of the cheque was to pay John Prust & Co. The witnesses did not deny, indeed, they admitted, that the money was clearly intended for John Prust & Co.; but in their view that was a matter between Cumberbirch & Potts and John Prust & Co. with which they, the paying bank, had no concern; in their view they had performed their mandate when they paid on the order of Cumberbirch. No practice of bankers however widely followed can absolve them from all obligation to see that money of their customer which they are ordered to pay for the benefit of one person is not paid away to another. The answers given in Questions on Banking Practice show that the alleged practice is not universally approved of, and it is submitted that it is contrary to law, and the appellants were guilty of negligence in following the practice: *Bissell & Co.* v. *Fox Bros. & Co.* (1)

With regard to the proviso to s. 79, sub-s. 2, relating to cheques which do not at the time of presentment appear to have been added to or altered otherwise than as authorized by the Act, the alteration or addition clearly refers to interference with the crossing of the cheque. The proviso is a re-enactment of s. 11 of the Crossed Cheques Act, 1876 (39 & 40 Vict. c. 81), an Act which relates to crossed cheques only, and which in s. 11 refers back to additions and alterations permitted by s. 5. But even if s. 79, sub-s. 2, of the Act of 1882 included alterations of and additions to the body of the cheque, the paying banker is only protected for a payment without negligence, which, for the reasons given above, the appellants have failed to establish. It is true that in *Slingsby* v. *Westminster Bank* (1) Finlay J. has acquitted the Westminster Bank of negligence in receiving this cheque. It is submitted with respect that the learned judge was wrong and that his decision should be overruled, and that the judgment of Wright J. in the present case should be affirmed.

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(1) (1884) 51 L. T. 663; (1885) 53 L. T. 193, C. A.

Cyril Atkinson K.C. in reply.

Cur. adv. vult.

Nov. 30. The following written judgments were delivered:

SCRUTTON L.J. The executors of Harry Turner deceased brought an action against the District Bank, Ld., where the executors' account was kept, to recover 5000*l*. in respect of a cheque dated December 4, 1929, which they alleged to be wrongfully debited to their account. Wright J. gave judgment in their favour (2), and the bank appeals.

Many points were raised on the appeal. One was as to the effect of a description of payee, which may be typified as "Pay A. per B.," another related to the liability of the bank as to the indorsement required, and a third to the bank's duty of enquiry. The executors first brought an action against the Westminister Bank, the collecting bank, which Finlay J. decided against the executors on grounds appearing in his judgment (1), to which I shall have to refer hereafter. The executors did not appeal against this decision; we were told that, the estate being largely devised in favour of charities, the Charity Commissioners had to be consulted,

(1) [1931] 2 K. B. 583.

(2) [1931] 2 K. B. 588.

and the Attorney-General's Department directed that no appeal should be brought as an action could be brought against the present defendants, the paying bank.

The immediate facts are few and not in dispute. The executors had as their solicitor a firm of Cumberbirch & Potts, the firm and its senior partner, Mr. Cumberbirch, being of the highest local repute. Mr. Cumberbirch and his clerk from time to time drew forms of cheques for the executors to sign. All these cheques had been drawn in favour of a named payee with no addition following his name. Some of them had the blank following the name of the payee filled with a line so as to prevent addition. The great majority of the cheques had no such line. In December, 1929, the executors had money to invest and determined to invest 5000*l.* in War Loan through well-known brokers, John Prust & Co. Cumberbirch filled in a form of cheque, "Pay John Prust & Co.," leaving a blank after the name of these payees. He obtained the signatures of three executors on December 4, and of the fourth on December 5. He then fraudulently inserted after the name of the payees the addition "per Cumberbirch & Potts." This addition was, of course, in the same writing and undistinguishable from the description of the payees. I am satisfied there was no "apparent alteration" of the cheque as originally signed. The two things suggested as pointing to alteration were the full stop after the name of the original payees and a slight slope in the writing of the addition, both facts in my opinion too minute to be noticed on reasonable inspection.

Cumberbirch had at the Westminster Bank a private account, and an account of a company of which he was chairman, the Palatine Industrial Finance Co., Ld., which on December 5 had a small credit balance of about 49*l.* On the afternoon of December 5 Cumberbirch brought to the Westminster Bank the altered cheque and a paying in slip. The cheque was indorsed "Cumberbirch & Potts," no reference being made to Prust. The paying in slip was, "Credit account of Palatine Industrial Finance Co., Ld., Current account." Cheques were drawn on this account

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on December 5 and 6 for about 565*l.*, and on December 7, the cheque, having been cleared, was paid by the District Bank to the Westminster Bank. Were it not that Finlay J. has held (1) that the Westminster Bank were not negligent in making no inquiries as to why a cheque for a large amount apparently destined for Prust & Co. through the medium of Cumberbirch & Potts was paid into the private account not of that firm, but of a company of which Cumberbirch was chairman, I should be clearly of opinion that it could not be argued that the Westminster Bank were not negligent. I am of opinion, following the principles laid down in *Underwood's* case (2), the *Lloyds Bank* case (3), and the recent decision of this Court in *Reckitt* v. *Midland Bank*, since affirmed in the House of Lords (4), that the Westminster Bank were negligent, and were therefore not holders in due course even though they allowed Cumberbirch and the Palatine Co. to draw against the cheque before it was cleared. The cheque was presented to the District Bank with its indorsement "Cumberbirch & Potts," and paid. Cumberbirch presently bolted; this and other frauds were discovered, and this action started under the circumstances already stated. Cumberbirch also paid a dividend warrant signed by one of the executors into his private account at the Westminster Bank on January 16, 1930. This did lead to inquiries by the bank, but only inquiries of Cumberbirch, who told a quite untrue story that it was the repayment of money that the executor owed him. There also Finlay J. found there was no negligence on the part of the bank (5), and again I should entirely disagree with him.

A quantity of banking evidence was called about the form "Pay A. per B.," indorsed "B.," and the banking witnesses said the indorsement was quite proper. It appears that such a form is commonly used when a company at the request of its shareholder pays a dividend by cheque to the shareholder's bank. The form of such a cheque is not seen by the shareholder, and the bank is, of course, above suspicion. It was said also to be used where a solicitor is acting in a property transaction, in payment of rates, in connection with underwriters, and in taking up bills of lading. I personally have some experience with the two latter classes of transaction, and I can only say that I cannot remember ever having seen such a description of a payee before, and I gather that the two other members of the Court share my experience. I am sure the form is not one generally used except in payment of dividends to banks. One of the banking witnesses, Mr. Hyde, said: "I do not think I have seen a cheque made out in this manner while I was at the counter." It is not suggested that the executors authorized this form, and its only importance is on the point what indorsement such a description of payee "A. per B." requires. On this all the banking witnesses said an indorsement "B." was sufficient; one of them said "A." would be "a nominal payee," but was unable to explain what he meant by that expression. When asked whether, if B. indorsed over to C., C. would be able to sue A., they appeared unable to answer. They did agree that the form showed that it was intended that the amount of the cheque should get to A., but through the medium of B. The witnesses were unanimous in their opinion, and when confronted with the opinions published by the Institute of Bankers in their official handbook—namely, answers 751, 752, 753 and 754, all they said was that those answers were wrong. I myself should take the view taken by Sir John Paget that the proper form of indorsement should be A. per pro B., meaning "I, B., sign A.'s name by his procuration or authority." Sect. 91 of the Bills of Exchange Act, 1882, appears to me to show that the signature of any relevant party to the bill, such as a payee or indorsee, should be on the bill, though it may be placed there by an agent who has the relevant party's authority, and the agent should state his authority, if he wishes to escape personal liability to subsequent indorsees as distinct from liability on warranty. This point was not pleaded in the first case before Finlay J. (1), and he does not deal with it. I should add that Finlay J. does dismiss the later action on the ground stated in these terms (2): "It was submitted by counsel for the defendant bank that the action, however put, was entirely misconceived. Whatever may be the rights, so it was argued, of the plaintiffs against their own bank, who have debited them, they can have no right to recover against the defendants—not in conversion of the cheque because the cheque was by reason of the alteration a mere valueless piece of paper, not in conversion for 5000*l.* because there was no conversion of any money of the plaintiffs, not for money had and received because the money was not the money of the plaintiffs. I have come to the conclusion that this submission is right and ought to prevail. It seems clear that the document, when it came into the hands of the defendant bank, was not a valid cheque at all. It had been avoided by the material alteration made in it. This being so, it seems to me that no action can be brought upon it against the defendants. They have not dealt either with a cheque or the money of the plaintiffs, and on this short ground I think this action must fail." I cannot understand this. There are, of course, difficulties as to how in law you should deal with money claimed by a customer from a bank because the bank has collected it from the customer's bank on a document which does not authorize such collection, but I thought that all those difficulties had been settled by the decision in *Morison's* case (3), followed by this Court in *Underwood's* case (4); in the *Lloyds Bank* case (5); and in *Reckitt* v. *Midland Bank*, lately affirmed in the House of Lords. (6) *Slingsby* v. *Westminster Bank* (7) is, in my opinion, wrongly decided and should not be followed by any Court in preference to these decisions of the Court of Appeal.

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(1) [1931] 2 K. B. 583.

(2) *Underwood* v. *Bank of Liverpool, &c.* [1924] 1 K. B. 775.

(3) *Lloyds Bank* v. *Chartered Bank of India, &c.* [1929] 1 K. B. 40.

(4) *Midland Bank* v. *Reckitt* (1932) 48 Times L. R. 271.

(5) [1931] 1 K. B. 173.

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(1) *Slingsby* v. *Westminster Bank* [1931] 1 K. B. 173.

(2) [1931] 2 K. B. 583, 585.

(3) *Morison* v. *London County and Westminster Bank* [1914] 3 K. B. 356.

(4) [1924] 1 K. B. 775.

(5) [1929] 1 K. B. 40.

(6) *Midland Bank* v. *Reckitt* (1932) 48 Times L. R. 271.

(7) [1931] 2 K. B. 583.

But the legal result of these facts begins earlier than indorsement. This cheque, having been signed by the executors in a form which gave Cumberbirch no rights, was fraudulently altered by Cumberbirch before it was issued and, it was not disputed, altered in a material particular, by the addition of the words "per Cumberbirch & Potts." The cheque was thereby avoided under s. 64 of the Bills of Exchange Act. A holder in due course might not be affected by an alteration not apparent, such as this alteration. But counsel for the District Bank did not contend that the Westminster Bank were holders in due course, and I am clear they were not. They could not therefore justifiably claim on the District Bank, and the cheque when presented to the District Bank was invalid, avoided, a worthless bit of paper, which the District Bank was under no duty to pay. This invalidity comes before any question of indorsement. Secondly, I am of opinion, as already stated, that if valid the cheque was not properly indorsed. The indorsement should have been "John Prust & Co. per pro Cumberbirch & Potts." Any attempt to prove a custom failed; the Bankers' Institute opinions show that the custom was not universal; there was no satisfactory evidence that the custom was known to business men outside the banking world, or that it was usual except in the case of dividend warrants paid to banks.

The defendant bank endeavoured to argue that the wording of s. 79 of the Act, "or to have been added to or altered otherwise than as authorized by this Act," protected them. The wording is clumsy, but in my opinion the section only refers to additions or alterations to the crossing. The wording of s. 78, and the later words of s. 79 make this clear. I agree with the view on this point expressed by Sir John Paget at p. 225 of his work. The protection given by ss. 80 and 82 is excluded in my opinion by the fact that the alteration has made the paper a null and void document, no longer a cheque.

There remains, first, the argument that the plaintiffs by their negligence in not drawing a line in the blank after the payee's name have enabled the fraud to be committed and cannot recover. Lord Finlay's definition in *Macmillan's* case (1) of the relation between banker and customer is that "the customer is bound to take usual and reasonable precautions to prevent forgery," the particular usual and reasonable precaution in that case being to leave no opportunity for adding to the amount of money stated either in words or figures. I am satisfied that it is not at present a "usual precaution" to draw lines before or after the name of the payee. If this sort of case becomes frequent, it may become a "usual precaution," but no banking witness had ever heard of a case like this before.

Secondly, the suggestion in the words of Ashhurst J. in *Lickbarrow* v. *Mason* (2) "that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it," is advanced. The answer is that given by Lord Lindley in *Farquharson Bros. & Co.* v. *King & Co.* (3), that "enabling" here can only apply where the plaintiff has in some way held out or represented the servant as having authority to do the acts complained of. In the present case, the plaintiffs have done nothing to represent to either bank that Cumberbirch had any authority to act as he did. This supposed maxim has been unsuccessfully put forward in each of the last three cases where Lord Terrington has defrauded Sir Harold Reckitt: *Reckitt* v. *Barnett* (4); *Reckitt* v. *Wheeler* (5); and *Reckitt* v. *Midland Bank*. (6)

Lastly, it was said that the decision of the House of Lords in *Lloyd* v. *Grace, Smith & Co.* (7) protected the defendants. I understand that case to be a case of a servant or agent using ostensible authority to do a certain class of acts for his employer who acts for his own benefit, with no notice to the person injured of his wrongful action. In the present case, as far as the Westminster Bank was concerned, there was no ostensible authority and there was notice putting that bank on inquiry; as far as the defendant bank was concerned, there was no ostensible authority.

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(1) [1918] A. C. 777, 789.
(2) (1787) 2 T. R. 63, 70.
(3) [1902] A. C. 325, 342.
(4) [1929] A. C. 176.
(5) (1930) Unreported.
(6) Unreported.
(7) [1912] A. C. 716.

I have expressed my judgment in my own words having regard to the exhaustive arguments addressed to us. I might, however, have been content to adopt the careful judgment of Wright J., with which I substantially agree.

The appeal must be dismissed with costs.

GREER L.J. The facts proved at the trial of this action are fully stated in the report of the case in the Court below (1), and I need not repeat them. The effect of the evidence may be sufficiently summarized as follows:—

1. The plaintiffs never signed any document which was in fact a mandate to the bank to pay the cheque if it was indorsed by Cumberbirch & Potts and presented to the defendants through a bank.

2. The immediate parties to the cheque when drawn were the (1.) plaintiffs; (2.) Messrs. Prust & Co., if and when they received the cheque; and (3.) the bank, if and when it was presented to them for payment.

3. The cheque never came into the hands of Messrs. Prust & Co. or of any one having authority to act for them.

4. Before presentation through the Westminster Bank to the defendant bank the cheque as signed was fraudulently altered in a material respect by Cumberbirch & Potts.

5. Between the time when it was signed by the plaintiffs and the time when it was presented by the Westminster Bank to the defendant bank it had never got into the hands of a holder in due course. Cumberbirch & Potts clearly were not holders in due course, and it was expressly admitted by Mr. Atkinson in his argument for the defendants that the Westminster Bank had not become holders in due course.

The plaintiffs never having in fact authorized the addition of the words "per Cumberbirch & Potts," or in any way authorized payment to Messrs. Cumberbirch & Potts, or to any bank receiving the proceeds on behalf of Messrs.

(1) [1931] 2 K. B. 588.

Cumberbirch & Potts, cannot be held bound to recognize the payment unless there is something in the Bills of Exchange Act, 1882, or the general law which prevents them from relying on the defence that they never authorized the defendant bank to pay the 5000*l.* to or on the order of Cumberbirch & Potts. It appears at one time to have been contended that s. 60 of the Bills of Exchange Act protected the defendant bank, but it seems clear that that section has no application to this case, because the defect in the cheque which rendered it invalid was on the face of the cheque and not merely in the indorsement. Under the provisions of s. 64 of the Act the cheque was rendered void except as therein stated. The proviso to that section does not protect the defendant bank, because if the cheque was restored to its original tenor the bank clearly could not sue the drawers on it. With regard to the proviso to s. 79 I agree with, and need not repeat, the opinion as to the effect of this proviso stated in the judgment of Scrutton L.J.

The question whether s. 80 applies to protect the defendant bank in this case is one of some difficulty. The section is as follows: " 80. Where the banker on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection, being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof."

I think in the first place that s. 80 only applies to a case where the true owner is somebody other than the drawer, and in the second place I think that it does not apply to a cheque which has been avoided by a material alteration before its issue. It is indisputable since the decision in *London Joint Stock Bank* v. *Macmillan* (1) that a customer owes to his bank a duty to exercise reasonable care in drawing cheques which he issues to a payee or bearer, and, as

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(1) [1918] A. C. 777.

Scrutton L.J. points out, Lord Finlay L.C. lays down that the test as to what care is required by law of a customer depends upon the answer to the question whether he has taken usual and reasonable precautions to prevent an unauthorized and material alteration of the cheque. In the present case a practice amongst bankers was proved that cheques were in certain cases drawn payable to one person "per" another person, and that in those cases the cheques were paid by banks when indorsed in the name of the latter person. Alterations to cheques by utilizing spaces left by the drawer and so increasing the amount appearing on the face of the cheque are not uncommon. A reasonably careful drawer of a cheque observing blank spaces which would provide an opportunity of increasing the amount to any person handling the cheque who was sufficiently dishonest to commit a fraud, would rightly be held to be guilty of want of reasonable care towards the bank, and he would be equally guilty of want of reasonable care if he signed the cheque without looking to see whether there were such blanks in it. I am not satisfied that a reasonably careful person drawing a cheque knowing nothing about the practice of bankers amongst themselves to honour cheques in the form in which this cheque was when presented, would be guilty of the want of care required of a reasonably careful customer towards his bank. Whether there was such want of care in this particular case is a question of fact, and I agree with the learned judge, and with my brethren, that no breach of duty towards the bank was established by the evidence.

I also agree with the opinion expressed by Wright J. in his judgment with regard to the wider protection of the bank against anything that might happen to the cheque before presentation, which commended itself to Lord Shaw, as appears in his speech in *Macmillan's* case. (1)

The only point remaining to be considered is whether the defendants are entitled to succeed on the ground that though the plaintiffs did not authorize the addition made to the cheque by Cumberbirch, they are liable on the doctrine

(1) [1918] A. C. 777.

of holding out for the same reasons that a solicitor was held liable for the fraudulent acts of his clerk in *Lloyd* v. *Grace, Smith & Co.* (1) I think this defence fails also. It is not part of the usual business of solicitors to write their clients' cheques, still less to alter them after they have been written. Every time a solicitor draws a cheque for signature he gets a particular authority to do a particular act. He does not draw his employers' cheques because that is within the apparent authority of solicitors generally, and, indeed, the argument before us was not based on this ground, but on the ground that the writing of the words "per Cumberbirch & Potts" was in fact the writing of Cumberbirch, who had written the words as they were when the cheque was signed, and the fact that they were added after signature was not apparent. The point is not one about which much can be said, but it seems to me to be impossible to hold that if I authorize a man to write out a document for me, it is therefore within his apparent authority to add something which alters the effect of that document. The act of writing the cheque is a mechanical act which is unimportant until the cheque is signed. I do not think there is any holding out to the bank that all the words on the cheque were written before the signature, or with the authority of the plaintiffs. Further, assuming that the plaintiffs are bound by the document as altered, I agree with Wright J. for the reasons stated in his careful judgment that the indorsement was ineffective, and that the defendants cannot rely upon the payment made to an indorsee who is some person other than the payee. It seems to me that if the cheque had been signed in the form in which it was when altered, the plaintiffs could still say to the bank, "We never requested you to pay the sum in question, 5000*l.*, to any one except Messrs. Prust & Co. personally, or to Messrs. Prust & Co., indorsing the cheque by themselves or their duly authorized agent. Messrs. Prust & Co. did not come for the money, nor was the cheque indorsed by them or in their name by Cumberbirch & Potts acting as their agents."

For these reasons I agree that the appeal should be dismissed.

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(1) [1912] A. C. 716.

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ROMER L.J. The questions arising upon this appeal appear to be as follows :—

1. Were the plaintiffs guilty of any breach of duty towards the defendant bank in signing the cheque in the form in which it was made out by Cumberbirch so as to bring themselves within the principle applied in the case of *London Joint Stock Bank* v. *Macmillan* ? (1)

2. Are the plaintiffs liable for the fraud committed by their agent Cumberbirch in subsequently adding the words "per Cumberbirch & Potts" so as to bring themselves within the principle applied in the case of *Lloyd* v. *Grace, Smith & Co.* ? (2)

3. Did the plaintiffs ever hold out Cumberbirch to the bank as their agent having authority to add the words in question ?

4. Assuming that for one or another of these reasons the bank were entitled as against the plaintiffs to treat the cheque as their cheque, was the bank justified in paying it upon the indorsement "Cumberbirch & Potts" ?

5. Are the bank protected from liability by reason of s. 60 or s. 80 of the Bills of Exchange Act ?

6. Are the bank protected by s. 79 of that Act ?

All these questions (other than those numbered 3 and 6) were carefully and fully considered by Wright J. and were decided by him in the plaintiffs' favour. In my opinion, he was right in so deciding and, subject to one observation, I accept both his conclusions and the reasons upon which they are based, to which reasons I do not think that I can usefully add anything.

The one observation to which I have referred is this. The learned judge in dealing with s. 60 of the Act expressed the view that the indorsement made by Cumberbirch was a forgery. The addition to the cheque made by him was undoubtedly a forgery. But, notwithstanding this and notwithstanding the fact that the indorsement made by him was insufficient, and probably intentionally and fraudulently insufficient, I doubt whether it is accurate to say that the indorsement in fact made was a forgery, or made without

(1) [1918] A. C. 777.

(2) [1912] A. C. 716.

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authority. It cannot be denied that Cumberbirch could properly indorse the words "Cumberbirch & Potts" on a cheque drawn in their favour. This being so, s. 60 could not in any case afford a defence to the bank.

In these circumstances, it only remains for me to deal with questions 3 and 6, which I gather were not raised before the learned judge.

Dealing first with question 3, the defendants, as I understand it, put their contention in this way. They say that, before the presentation of the cheque in question in this case, some thirty cheques signed by the plaintiffs, which had admittedly been filled up in Cumberbirch's handwriting, had been presented to them and paid; that the plaintiffs in this way held out Cumberbirch as their agent for the purpose of preparing cheques for their signature; that the defendants were accordingly entitled to assume that everything appearing upon a cheque of the plaintiffs that was in the handwriting of Cumberbirch was placed there by him as their authorized agent before signature; and that the plaintiffs are precluded from denying that he was their agent in the present case.

But there was no evidence given by the bank, to which our attention was called, that suggested that the bank ever made any such assumption in fact or ever regarded Cumberbirch as being the authorized agent of the plaintiffs to fill up cheques for their signature; and even had they done so, the fact that the plaintiffs had, even on numerous occasions, employed Cumberbirch to prepare cheques for their signature cannot amount to a holding out by them of Cumberbirch as their general agent for that purpose. To the contention of the defendants upon this point I think that a sufficient answer may be given in the words of Lord Lindley in the case of *Farquharson Bros. & Co.* v. *King & Co.* (1): "I do not myself see upon what ground a person can be precluded from denying as against another an authority which has never been given in fact, and which the other has never supposed to exist."

(1) [1902] A. C. 325, 341.

It only remains to deal with the defence founded upon s. 79 of the Bills of Exchange Act, 1882. As to this it was contended before us by Mr. Atkinson that in the present case a cheque had been presented to the defendants for payment which did not at the time of presentment appear to have been added to or altered otherwise than as authorized by the Act, and that the defendants, having paid it in good faith and without negligence, are, by the proviso to the section, relieved from all responsibility or liability. It is in my opinion clear that the proviso is dealing solely with cheques that have in fact been crossed, but on which the crossing has been removed or added to or altered otherwise than as permitted by the Act without there being anything upon the face of the cheque to draw the banker's attention to the fact. But for the proviso, the banker paying such a cheque otherwise than to a banker or, in the case of a specially indorsed cheque, paying it to the wrong banker, would or might have been liable to the true owner, even though he acted in good faith and without negligence. As I read the proviso, its object and effect is to relieve the banker of that liability. In my opinion, according to its true construction, the only responsibility or liability from which the proviso relieves the banker is the responsibility or liability arising by reason of the cheque having been originally crossed or of the crossing having been obliterated, or having been added to or altered otherwise than as authorized by the Act. If this be so, the section obviously has no application to the present case.

In my judgment, this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Slater, Heelis, Sandbach, Marriott, Smiths & Irvine, Manchester.*

Solicitors for respondents: *Vaudrey, Osborne & Mellor, Manchester.*

W. H. G.

K. B. D.
1931
Nov. 18.
C. A.
Dec. 14.

THE KING *v.* JUDGE LAILEY.

Ex parte KOFFMAN.

County Court—Jurisdiction—Action for Declaration of Partnership and Account—Denial of Partnership by Defendant—Jurisdiction of Court to entertain Action—Action in wrong County Court—Discretion to hear the Action—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 67, *sub-s.* 7; *s.* 75—*County Courts Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 73), *s.* 10.

The jurisdiction conferred by s. 67, sub-s. 7, of the County Courts Act, 1888, which gives the county court power to entertain actions for the dissolution or winding-up of a partnership where the property does not exceed the value specified, is not limited to an action in which the existence of the partnership alleged by the plaintiff is admitted by the defendant, but extends to an action in which it is not so admitted.

An action in which the plaintiff claims a declaration of partnership between himself and the defendant and an account of his share of the profits of the partnership business is in substance an action for the dissolution or winding-up of a partnership within the meaning of that sub-section:—

So *held* by the Court of Appeal, affirming the Divisional Court's decision.

Where, contrary to s. 75 of the County Courts Act, 1888, an action in the county court for the dissolution or winding-up of a partnership is brought in a district other than that in which the partnership is being carried on, the county court judge before whom the action comes has a discretion under s. 10 of the County Courts Act, 1919, to hear and determine it.

So *held* by the Court of Appeal.

ORDER NISI for a mandamus.

Mrs. S. Sunshine carried on business as a manufacturing furrier at Hackney, in the county of London, and also a retail business for the sale of furs at Southampton, her husband acting as her business manager. She had for many years employed Mr. Isadore Segall at Hackney as a cutter, and from about October, 1930, she employed Mr. Jack Isadore Koffman there in a like capacity.

In May, 1931, Mr. Koffman brought an action in the Southampton County Court against Mrs. Sunshine and Mr. Segall, the praecipe for the summons in the action giving the names of the parties and stating that the plaintiff's claim was an "application for declaration of partnership and account." The plaintiff in his particulars of claim stated (inter alia) that on or about the end of December, 1930, a verbal agreement was made between the defendant Mrs. Sunshine, by her agent, and the defendant Mr. Segall and the plaintiff to form a partnership business for the purpose of carrying on on the terms therein mentioned the business of a furrier which was formerly carried on under the name of Mrs. S. Sunshine at Hackney; that from December, 1930, till on or about the beginning of April, 1931, the partnership business was carried on in accordance with the verbal agreement; and that the plaintiff claimed that the Court should declare that the partnership existed on the terms of the verbal agreement, and that a profit and loss account and all other necessary accounts of the partnership business should be taken and submitted to the Court. In the copy of these particulars which was served upon the defendant Mrs. Sunshine, it was stated that the plaintiff claimed 47*l.* 0*s.* 2*d.* as his share of the profits of the partnership business.

The defendant Mrs. Sunshine delivered particulars of her defence, in which she stated that she never entered into any such agreement with the plaintiff and/or the defendant Mr. Segall as was alleged in the particulars of claim, that she denied that there ever was any partnership between her and the plaintiff and/or the defendant Mr. Segall as alleged or at all, and that she would take the objection that the Court had no jurisdiction in the action; and the defendant Mr. Segall delivered particulars of his defence, which mutatis mutandis were to the same effect. The defendants did not allege that the value of the property of the alleged partnership exceeded 500*l.*

On June 9, 1931, the action came on for hearing in the county court. The above mentioned objection was taken on behalf of the defendants as a preliminary objection, and the point thus raised was argued on both sides. The judge was of opinion that as there was a dispute as to the existence of the partnership he had no jurisdiction to order an account, and, the only other claim being for a declaration which could not of itself be entertained, he upheld the objection, and without entering into the merits dismissed the action with costs.

On July 13, 1931, the plaintiff obtained an order nisi calling upon the learned judge and the defendants to show cause why the judge should not proceed to hear and determine the action on the grounds: that the judge wrongly decided the preliminary point as to his jurisdiction in partnership actions; that he was wrong in holding that where the partnership was disputed he had no power to order an account; that he should have held that he had jurisdiction under s. 67, sub-s. 7, of the County Courts Act, 1888, and under the other sections of the County Courts Acts referring to his jurisdiction in partnerships; and that he was wrong in holding that the action was for a declaration only, and should have held that it was for an account and that the declaration was ancillary to the claim for an account, and that he had jurisdiction to order an account.

The order nisi was obtained at the instance of the plaintiff upon notice thereof to be given to the learned judge and to the defendants. In his affidavit in support of the order nisi, the plaintiff stated that the whole property, stock and credits of the partnership did not exceed in amount or value the sum of 500*l.*

J. P. Eddy for the defendants showed cause. The order nisi should be discharged. The learned county court judge rightly allowed the preliminary objection taken on behalf of the defendants that he had no jurisdiction to entertain the action. The county court is entirely the creature of statute, and its jurisdiction in partnership is conferred upon it only by s. 67, sub-s. 7, of the County Courts Act, 1888, which provides that it shall have all the powers of the High Court in actions and matters for the dissolution or winding-up of any partnership in which the property shall not exceed 500*l.* The county court judge had no jurisdiction under that sub-section to entertain the plaintiff's claim for a declaration of partnership, because the sub-section gives him no power to make a declaration of that kind. In any case he had no jurisdiction to entertain a claim for a declaration, except as ancillary to a claim for a sum of money or for some other substantive relief which could be granted: *Rex* v. *Cheshire County Court Judge. Ex parte Malone* (1); *De Vries* v. *Smallridge* (2); *Humber Conservancy Board* v. *Federated Coal and Shipping Co.* (3); and here, as will presently appear, there was no claim for any other relief of that kind. Neither had the judge jurisdiction to entertain the plaintiff's claim for an account. A claim for an account is not in form a claim for the dissolution or winding-up of a partnership. Further, even if the claim for an account is in substance a claim for the dissolution or winding-up of an alleged partnership, it is not a claim for the dissolution or winding-up of a partnership within the meaning of the sub-section. That sub-section should be construed according to the plain meaning of its terms. When so construed it clearly means that the county court shall have jurisdiction to entertain an action for the dissolution or winding-up of an admitted partnership. It cannot mean that the court is to have jurisdiction to entertain an action for the dissolution of a partnership, the existence of which is not admitted, because it does not give the court any power to inquire whether or not an alleged partnership does in fact exist. That construction of the sub-section is in accordance with the Partnership Act, 1890, s. 2 of which provides for determining the existence of a partnership, while a later and entirely distinct section—namely, s. 39, provides for the dissolution of a partnership the existence of which has already been established: see also Lindley on Partnership, 9th ed., p. 722. In the present case the defendants do not admit the alleged partnership, but on the contrary they both expressly deny it, and there thus arises the issue of the existence of an alleged partnership with which the county court has no power to deal. Moreover, the county court is intended to be a court for the determination of simple cases only, and s. 67, sub-s. 7, in giving that court a limited jurisdiction in partnership cases only gave it power to deal with comparatively short cases of that nature. The issue of the existence of a partnership may give rise to lengthy and complicated inquiries, as appears from s. 2 of the Act of 1890, and may therefore necessitate a protracted investigation which could not be conducted in the county court. On that ground also this case is excluded from the jurisdiction of the county court. An action for the dissolution of a partnership in which the existence of the partnership is not admitted is one which cannot be brought in the county court, but only in the Chancery Division of the High Court. Where a county court judge declines to entertain an action, erroneously believing that he has no jurisdiction, an order may no doubt be obtained under s. 131 of the County Courts Act, 1888, compelling him to hear and determine it: *Reg.* v. *Southampton County Court Judge* (1); but here the learned judge was right in holding that he had no jurisdiction.

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(1) [1921] 2 K. B. 694.
(2) [1928] 1 K. B. 482.
(3) [1928] 1 K. B. 492, 496.

F. Ashe Lincoln for the plaintiff, in support of the order nisi. No good cause has been shown why the learned county court judge should not hear and determine the action, and the order nisi should be made absolute. The judge had jurisdiction to entertain the plaintiff's claim for a declaration of partnership as ancillary to his claim for an account, provided that the claim for an account was one which the judge could entertain under s. 67, sub-s. 7, of the County Courts Act, 1888. The plaintiff's claim for an account is a claim which the judge could entertain under that sub-section. It is a claim for a partnership account, and is in substance a claim for the dissolution or winding-up of a partnership, within the meaning of the sub-section. That sub-section on its true construction gives the county court power to entertain any action for the dissolution or winding-up of any alleged partnership falling within the assigned limits. The construction put upon the sub-section on behalf of the defendants cannot be correct. It reads into the sub-section a word which it does not contain—namely, the word "admitted" immediately before the word partnership. It would render the sub-section nugatory by enabling the defendant in any action brought under it to oust entirely the jurisdiction of the county court by merely denying the partnership. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 56, sub-s. 1 (*b*), assigns to the Chancery Division of the High Court all causes and matters for the dissolution of partnerships or the taking of partnership accounts. If the argument on behalf of the defendants is sound, the word "admitted" should be read into that provision before the word partnership, and in any action brought thereunder in the Chancery Division it would be open to the defendant to oust the jurisdiction of the Court by merely stating in his pleading that he did not admit the partnership. Actions under that provision, in which the defendant disputes the partnership, are, however, heard and decided in that Court. The judge abstained from entering upon the merits of the case in consequence of his wrongly deciding the preliminary question of jurisdiction, and he should be set right by the making of this order absolute: see Annual County Courts Practice, 1931, p. 169.

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(1) (1891) 65 L. T. 320.

Eddy in reply. The Chancery Division of the High Court has power to deal with actions and matters for the dissolution or winding-up of a partnership apart altogether from that conferred upon it by s. 56, sub-s. 1 (*b*), of the Act of 1925; but the county court has no power to deal with actions and matters of that kind except under s. 67, sub-s. 7, of the Act of 1888.

AVORY J. This is an order nisi calling upon the learned judge of the Southampton County Court to show cause why he should not proceed to hear and determine an action in that court between the plaintiff and the two defendants for a declaration of partnership and an account; and it was obtained on the grounds (inter alia) that the judge wrongly decided the preliminary point that had been taken as to his jurisdiction in partnership actions, and that he was wrong in holding that as the partnership was disputed he had no power to order an account. The plaintiff's claim in the county court was put forward in the first instance in the praecipe for the summons, where it is stated to be an "application for declaration of partnership and account," the names of the parties being given. That was followed in due course by particulars of the plaintiff's claim from which, as supplemented by his affidavit, the plaintiff's case fully appears. He there alleges that there was a verbal agreement for partnership between him and the two defendants which continued from January 1, 1931, to April 14, 1931. In my view that statement must be read as an allegation by the plaintiff that the partnership was dissolved either by effluxion of time or by agreement on the last mentioned date. In the particulars the plaintiff then, after stating the terms of the alleged agreement, goes on to claim a declaration that a partnership existed on these terms and that an account of the partnership business be taken. In the duplicate of the particulars delivered to one of the defendants the plaintiff further claims the sum of 47*l.* 0*s.* 2*d.* as his share of the profits of the partnership business. To the claim of the plaintiff each of the defendants delivered separate particulars of defence, denying that there was any such agreement as alleged by the plaintiff or that there ever was any partnership as alleged or at all, and objecting to the jurisdiction of the court to entertain the action.

Sect. 67, sub-s. 7, of the County Courts Act, 1888, provides that the county court shall have all the powers of the High Court in actions for the dissolution or winding-up of any partnership in which the whole property shall not exceed in value 500*l.* No point is here taken by the defendants that the property of the alleged partnership exceeded 500*l.* On the action coming before him the county court judge held that he had no jurisdiction to entertain it on the ground that there was a dispute between the parties whether any partnership existed. Counsel for the defendants, in showing cause, says that the judge was right in so holding, because s. 67, sub-s. 7, only applies where there is an action or application for the dissolution or winding-up of an admitted partnership.

The only question here is whether, in view of the fact that the partnership is disputed, this is an action or matter for the dissolution or winding-up of a partnership within the meaning of s. 67, sub-s. 7. In my opinion it clearly is an action or application for the winding-up of a partnership, notwithstanding that the alleged partnership is disputed by the defendants. When it is said that the word partnership in the sub-section only applies to an admitted partnership, and that the defendant by denying the existence of the partnership can oust the jurisdiction of the Court, it seems to me that a similar contention might equally be made in respect of other sub-sections of the same section. Sub-s. 2 gives the county court power to deal with actions for the execution of trusts up to a certain limit; and sub-s. 4 gives it power to deal with actions for the specific performance of an agreement for the sale or lease of property up to a certain value. I cannot think that the jurisdiction of the Court under these two sub-sections respectively could be ousted by a mere statement on the part of the defendant that there was no trust or no agreement for sale or lease. In fact the logical result of this argument of the defendants would be that when an ordinary money claim is made under s. 56 of the Act of 1888, which gives jurisdiction to the county court in personal actions for a debt or demand of not more than a specified amount, it would be open to the defendant to oust the jurisdiction by merely saying that he did not owe the money, and that that section only applied where there was an admitted debt. It could not be contended that that was the right interpretation of s. 56, and it seems to me to be equally wrong to say that the jurisdiction of the county court under s. 67, sub-s. 7, can be ousted by a denial of the partnership.

In my opinion the view taken by the county court judge was wrong, and this order nisi should be made absolute.

HUMPHREYS J. I am of the same opinion. Mr. Eddy, in showing cause on behalf of the plaintiff, has taken two points, one of which is of serious importance.

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Humphreys J.

His first point was that the action was in such a form that the county court judge could not entertain it. The praecipe for the summons is certainly inartistically drawn. It asks for a declaration of partnership and an account. In so far as it asks for a declaration of partnership, I think that the county court judge could say that he had no power to grant that. The praecipe, however, goes on to ask for an account. Sect. 67, sub-s. 7, of the County Courts Act, 1888, gives power to the county court to deal with actions for the dissolution or winding-up of any partnership up to a limit which included the partnership in question. In the praecipe and in his particulars of claims the plaintiff asks for a winding-up account of the partnership, which is substantially the same thing as a winding-up of the partnership. The claim is a claim for the winding-up of a partnership, and it therefore falls within the express words of the sub-section.

As to the other point taken on behalf of the plaintiff—namely, that the jurisdiction is ousted as soon as the defendant denies the existence of the partnership, I agree with all that my Lord has said on that point.

MACNAGHTEN J. I agree. The plaintiff says, rightly or wrongly, that he had carried on business in partnership with the two defendants on the terms that the profits of the partnership were to be divided equally among them; that the partnership was dissolved on April 14, 1931; and that he had not received his share of the partnership profits. He made an application to the county court judge under s. 67, sub-s. 7, of the County Courts Act, 1888, for an account of the profits to which he was entitled on the dissolution of the partnership. The answer of the defendants was that there never was a partnership between the plaintiff and themselves. The county court judge seems to have thought that this plea ousted his jurisdiction, and that it was not open to him to inquire whether or not there was a partnership. It seems to me that he was not right in taking that view. I agree that he had jurisdiction to entertain the plaintiff's claim.

Order absolute.

J. R.

The defendants appealed. The appeal was heard on December 14, 1931.

J. P. Eddy for the appellants. The county court judge was right in holding that he had no jurisdiction to hear and determine the action. The first ground on which this is so is one not taken in the Court below. It is that as the alleged partnership was being carried on at Hackney, the action must be brought under s. 75 of the County Courts Act, 1888, in that district, and could not therefore be heard in the Southampton County Court.

[Lord Hanworth M.R. The County Courts Act, 1919, s. 10, enables a county court judge to hear and determine a case which ought not to have been brought in his particular court.]

The second ground is that under s. 67, sub-s. 7, of the Act of 1888, the county court is only given jurisdiction in actions "for the dissolution and winding up of any partnership. . . ." That does not enable the judge to decide first whether a partnership existed, and make a declaration accordingly. The county court is the creation of statute, and has no jurisdiction beyond that conferred by statute. Sect. 67, sub-s. 7, defines the jurisdiction in regard to partnerships, and no county court judge can go outside it.

F. Ashe Lincoln for the respondent was not called upon.

Lord Hanworth M.R. This appeal fails. Mr. Eddy has quite candidly admitted that the first point taken by him, which was not argued in the Court below, is really met by s. 10 of the County Courts Act, 1919, which provides that, if a county court judge finds a case before him which ought to have been brought in some other county court, his jurisdiction is not defeated, but he has power to hear and determine the case if he thinks fit.

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The second point turns on s. 67 of the County Courts Act, 1888, which was passed for the purpose of conferring power on county courts to deal with certain matters that would otherwise not be within their jurisdiction. It is with that object that matters are catalogued in s. 67. Some of them are matters specially allocated to the Chancery Division, and they would not therefore appertain to the county court as it was originally founded. It is suggested that under s. 67, sub-s. 7, which gives the county court all the powers and authority of the High Court in actions "for the dissolution or winding up of any partnership in which the whole property, stock and credits of such partnership shall not exceed in amount or value the sum of 500*l.*," it has to be agreed that a partnership existed before the jurisdiction of the county court to deal with its dissolution or winding-up can arise. But I agree with Avory J. and the other judges of the King's Bench Division who sat in the Divisional Court that so to hold would be to take too narrow a view of the section. The county court has power to decide whether there is a contract between parties before it, and that contract might constitute a partnership; and then jurisdiction is given to the county court, in cases to which s. 67, sub-s. 7, applies, to deal with the dissolution and winding-up as fully as the Chancery Division.

There is therefore no reason for accepting the appellants' second contention, and the appeal must be dismissed.

LAWRENCE L.J. In my judgment the Divisional Court was clearly right in this case, and I desire to add nothing to what Avory J. is reported to have said (1) and to what the Master of the Rolls has now said.

Appeal dismissed.

Solicitors for appellants: *Gustavus Thompson & Sons, for Max Turk, South Farnborough.*

Solicitors for the respondent: *Bishop & Fenton-Jones.*

H. C. G.

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(1) [1931] W. N. 266.

BETTS AND OTHERS v. LEICESTER CORPORATION.

1932
Feb. 1.

Electricity—Scheme for the improvement of the existing Organization for the Supply of Electricity in a District—Establishment of an Advisory Board—Compensation for Loss of Employment or Diminution of Wages—" Within five years from the date when . . . . a scheme for the improvement of the supply of electricity in any district has come into operation "—" Scheme "—" Technical Scheme "—Generating Stations closed down under Scheme—Whether Claims for Compensation made within Five Years—Electricity (Supply) Act, 1919 (9 & 10 *Geo.* 5, *c.* 100), *ss.* 5, 7, 16—*Electricity (Supply) Act,* 1922 (12 & 13 *Geo.* 5, *c.* 46), *ss.* 19, 21—*Electricity (Supply) Act,* 1928 (19 *Geo.* 5, *c.* 4), *s.* 1.

Sect. 16 of the Electricity (Supply) Act, 1919, provided that "if . . . . within five years from the date when under this Act . . . . a scheme for the improvement of the supply of electricity in any district has come into operation," any servant who has been regularly employed in any authorized undertaking proves that in consequence of the scheme he has suffered loss of employment or diminution of wages he shall be entitled to compensation.

The Electricity Commissioners, in order to provide for the improvement of the existing organization for the supply of electricity in a district, made an Order under s. 7 of the Act of 1919, constituting an electricity district and establishing an Electricity Advisory Board for that district. The Order, which provided that the Scheme set out in the Schedule to the Order should operate and have effect, came into operation on June 4, 1924, having been previously confirmed by the Board of Trade and approved by resolutions passed by both Houses of Parliament. Under the Scheme set out in the Schedule, the Advisory Board could only make recommendations to the constituent bodies composing it and to the Electricity Commissioners. Para. 11 of the Scheme provided as follows: "(1.) The main outlines of the Technical Scheme for the improvement of the supply of electricity in the district, to which the general approval of the Commissioners is hereby given, are set forth in the Second Annex hereto which Annex shall be deemed to form part of this Scheme and shall have effect accordingly. (2.) The Board shall take all steps within their power to secure the carrying into effect of the Technical Scheme, which may be modified or varied with the approval of the Commissioners." The main outlines of the Technical Scheme in the Second Annex provided that certain generating stations, including a new one belonging to the Leicester Corporation, should be utilized under the Scheme and extended as might hereafter be determined, and that certain generating stations, including two belonging to the Leicester Corporation, should be utilized until the load could be transferred to the new stations. Those two stations were closed down in August and September, 1930, and a number of workmen employed therein in consequence lost their employment or suffered a diminution of wages, and on November 5, 1930, they claimed compensation from the Leicester Corporation under s. 16 of the Electricity (Supply)

Act, 1919. It was contended on their behalf that the word "scheme" in that section referred not to the Scheme in the Schedule to the Order, under which the Advisory Board was established, but to the Technical Scheme set out in the Annex, which provided for the closing of the two generating stations and under which they were closed:—

Held, that the word "scheme" in s. 16 meant the Scheme for the improvement of the existing organization for the supply of electricity in any district which the Electricity Commissioners had to approve or formulate under s. 5 of the Act of 1919, and the Order giving effect to which in the present case came into operation under s. 7 of that Act, as soon as it was confirmed by the Board of Trade and approved by resolutions of both Houses of Parliament, the last of which in the present case was June 4, 1924, and consequently the claims for compensation were out of time. Further, even if the word "scheme" in s. 16 meant Technical Scheme, inasmuch as para. 11 of the Schedule provided that the Second Annex, in which the main outlines of the Technical Scheme were set out, should be deemed to form part of the Scheme and should have effect accordingly, therefore it came into operation on the same date as the Scheme.

AWARD in the form of a Special Case.

1. Certain named claimants claimed that they had suffered loss of employment, other named claimants claimed that they had suffered diminution of wages and status, as a result of the closing down of the Lero and Aylestone generating stations of the Leicester Corporation Electricity Undertaking under the provisions of the Scheme scheduled in the East Midlands Electricity District Order, 1924, and that they were entitled to compensation under the Electricity (Supply) Acts, 1919–1928.

2. The Leicester Corporation denied that the claimants were entitled to compensation.

3. The Ministry of Labour, to whom the claims had been reported, appointed Sir Harold Morris K.C., under s. 16 of the Electricity (Supply) Act, 1919, to act as referee in the matter.

4. The referee heard the parties in Leicester on May 6, and in London on June 3 and on July 14, 1931.

5. The claims made on behalf of three claimants were withdrawn at the hearing, and the referee made no award in those cases.

6. The referee, having duly considered the evidence and contentions of the parties, found and awarded that four of

the claimants did not suffer loss of employment in consequence of the closing down of the Lero and Aylestone generating stations of the Leicester Corporation and that they were not entitled to compensation under the Electricity (Supply) Acts, 1919 to 1928.

7. With reference to the claims of the other claimants, on the evidence given and admissions made, the referee found as hereinafter set out in paras. 8 to 29 inclusive.

8. The Leicester Corporation were authorized undertakers within the Electricity (Supply) Act, 1919.

9. In accordance with instructions received from the Tramways and Electricity Committee of the Leicester Corporation, Mr. C. H. Wordingham, M.Inst.C.E., M.I.Mech.E., M.Inst.E.E., on May 17, 1917, made a report on the electrical undertaking of the Leicester Corporation, and in his report suggested (inter alia) that a central generating station should be erected on a property known as Freeman's Meadows, and that the Lero and Aylestone stations of the Leicester Corporation should ultimately be closed down.

10. The Corporation of Leicester adopted the recommendations of the report, and thereafter promoted a bill for the purpose of acquiring the property known as Freeman's Meadows. This bill resulted in the Leicester Corporation Act, 1919, which received the Royal Assent on August 19, 1919.

11. Correspondence passed between the Leicester Corporation and the Electricity Commissioners with reference to the construction of, and for authority to borrow money for the purpose of developing, a generating station at Freeman's Meadows.

12. Thereafter, the Leicester Corporation proceeded with the erection of a generating station at Freeman's Meadows in accordance with the advice contained in the report of Mr. Wordingham.

13. In or about the year 1923 the Electricity Commissioners provisionally determined that a certain area comprising parts of the counties of Derby, Leicester, Nottingham and Stafford should be constituted a separate electricity district for the purposes of the Electricity (Supply) Act, 1919.

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14. The Commissioners, after due notice, gave to authorized undertakers, county councils and local authorities (including the Leicester Corporation) and others who appeared to the Commissioners to be interested, an opportunity to submit schemes for effecting the improvement of the existing organization, including proposals for altering or adjusting the boundaries of the district and the formation of a Joint Electricity Authority for the district.

15. The Leicester Corporation submitted to the Commissioners the Scheme as recommended by Mr. C. H. Wordingham, which they were at that time in process of carrying out.

16. Thereafter, the Electricity Commissioners made an Order under s. 7 of the Electricity (Supply) Act, 1919, constituting the East Midlands Electricity District, and establishing the East Midlands Electricity Advisory Board. A copy of the Order was attached to the Special Case.

17. The Scheme set out in the Schedule to the Order so far as the undertaking of the Leicester Corporation was concerned was in the main similar to the Scheme of Mr. C. H. Wordingham adopted by the Leicester Corporation.

18. The Scheme set out in the Schedule to the Order was a scheme for the improvement of the supply of electricity in a district.

19. On September 1, 1924, the East Midlands Electricity Advisory Board approved a draft agreement made between the Derbyshire and Nottinghamshire Electric Power Company and the Leicestershire and Warwickshire Electric Power Company.

Approval of the above agreement was the first operative act done by the East Midlands Electricity Advisory Board under the East Midlands Electricity District Order, 1924. The Leicester Corporation were not concerned in the said agreement.

20. On December 17, 1925, the Engineers' Committee of the East Midlands Electricity Advisory Board approved the application of the Leicester Corporation to the Electricity Commissioners to instal an additional 15,000 kilowatt set at their central station (Freeman's Meadows), and

recommended the Board so to inform the Electricity Commissioners.

On December 21, 1925, the East Midlands Electricity Advisory Board confirmed the recommendation of the Engineers' Committee.

21. On May 19, 1927, the Engineers' Committee of the East Midlands Electricity Advisory Board approved an application by the Leicester Corporation to the Electricity Commissioners for sanction to the borrowing of 640,000*l.* in connection with the installation of two 25,000 kilowatt turbo-generators and the necessary plant in connection therewith.

On May 26, 1927, the East Midlands Electricity Advisory Board adopted the approval and recommendation of the Engineers' Committee for the extension of the Leicester Central Generating Station.

22. On November 24, 1927, at a meeting of the Engineers' Committee of the East Midlands Electricity Advisory Board, a letter was read dated September 15, 1927, from the secretary to the Electricity Commissioners enclosing a formal consent to the extension of the Leicester Freeman's Meadows Generating Station by the installation of one three-phase 50 cycle turbo-alternator having a maximum continuous rating of 25,000 kilowatts, three 150,000*l.* boilers and additions to buildings, such consent being without prejudice to the consideration of the application for sanction to the borrowing of the money necessary for the purpose.

On December 8, 1927, at a meeting of the East Midlands Electricity Advisory Board a report of the Engineers' Committee was laid before the Board. Leicester Generating Station—Installation of Additional Plant. The consent of the Electricity Commissioners to the extension of the Leicester Freeman's Meadows Generating Station by the installation of additional plant contained in their letter of September 15, 1927, was noted.

23. The work of erecting and installing the generating station at Freeman's Meadows was proceeding during the year 1924.

24. Generation of electricity was developed at Freeman's Meadows and sets were brought into operation there as follows :—

December 9, 1922 . .	One set of 10,000 k.w.
November 26, 1924 . .	One set of 12,500 k.w.
	One set of 500 k.w.
March 1, 1928 . . .	One set of 18,750 k.w.
February 19, 1930 . .	One set of 25,000 k.w.
	One set of 1500 k.w.

25. During the period from December 9, 1922, to February 19, 1930, as the generating station at Freeman's Meadows was being developed, less electrical energy was generated from the Lero and Aylestone stations, and towards the end of this period these two stations were used only for stand-by purposes.

26. The Lero and Aylestone Generating Stations were closed down in the months of August and September, 1930.

27. In consequence of the closing down of the Lero and Aylestone Generating Stations the claimants hereinafter named on the dates set out suffered loss of employment otherwise than on grounds of misconduct, incapacity or superannuation. [The names of seven claimants were set out on various dates in October.]

28. In consequence of the closing down of the Lero or Aylestone Generating Stations, the claimants hereinafter named on the dates set out suffered diminution of wages otherwise than on grounds of misconduct, incapacity or superannuation and have been placed in a worse position in respect to their conditions of service. [The names of twenty-five claimants were set out on various dates.]

29. All the claimants whose names were set out in paras. 27 and 28 of the award had before the dates stated therein been regularly employed by the Leicester Corporation.

On November 5, 1930, claims for compensation under the Electricity (Supply) Acts, 1919 to 1928, were made to the Leicester Corporation on their behalf.

30. The referee found that the Lero and Aylestone Generating Stations were closed down under the provisions

of the Scheme scheduled in the East Midlands Electricity District Order, 1924.

31. The referee found that the Scheme scheduled in the East Midlands Electricity District Order, 1924, came into operation on June 4, 1924.

32. The referee found and awarded that the claimants whose names were set out in paras. 27 and 28 of the award were not entitled to compensation under the Electricity (Supply) Acts, 1919 to 1928.

He further found and awarded that the claimants should pay to the Leicester Corporation their costs of the arbitration and should bear their own costs and pay the costs of the award.

33. It was contended on behalf of the claimants:

(*a*) That the Lero and Aylestone Generating Stations were closed down under the provisions of the Scheme scheduled in the East Midlands Electricity District Order, 1924.

(*b*) That the Scheme scheduled in the East Midlands Electricity District Order, 1924, came into operation when the Lero and Aylestone Generating Stations were closed down, or alternatively on December 21, 1925. (1)

(*c*) That the claimants whose names were set out in paras. 27 and 28 of the award were entitled to compensation under the Electricity (Supply) Acts, 1919 to 1928.

34. It was contended on behalf of the Leicester Corporation:

(*a*) That the Lero and Aylestone Generating Stations were not closed down under the provisions of the Scheme scheduled in the East Midlands Electricity District Order, 1924.

(*b*) That the Scheme scheduled in the East Midlands Electricity District Order, 1924, came into operation on June 4, 1924.

(*c*) That the claimants whose names were set out in paras. 27 and 28 of the award were not entitled to compensation under the Electricity (Supply) Acts, 1919 to 1928.

35. The questions for the opinion of the Court were:—

(*a*) Whether the Lero and Aylestone Generating Stations were closed down under the provisions of the Scheme scheduled in the East Midlands Electricity District Order, 1924 ?

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(1) That being the date on which the first operative act, as far as regards the Leicester Corporation, was done by the East Midlands Electricity Advisory Board, as set out in para. 20.

(*b*) At what date the Scheme scheduled in the East Midlands Electricity District Order, 1924, came into operation ?

(*c*) Whether the claimants whose names were set out in paras. 27 and 28 of the award were entitled to compensation under the Electricity (Supply) Acts, 1919 to 1928 ?

36. If the Court should decide that the claimants were entitled to compensation under the Electricity (Supply) Acts, 1919 to 1928, then the referee awarded that the Leicester Corporation should pay to the claimants the amounts set out in the award against their respective names [the names of thirty-two claimants with varying amounts of compensation were set out in this paragraph of the award] and should pay to the claimants their costs of the arbitration together with the costs of the award and should bear their own costs of the arbitration.

37. If the Court should decide that the claimants were not entitled to compensation under the Electricity (Supply) Acts, 1919 to 1928, then the referee awarded that the claimants should pay to the Leicester Corporation their costs of the arbitration and should bear their own costs, and pay the costs of the award.

Hon. Sir Stafford Cripps K.C. and *Harold Murphy* for the claimants. The question in this case turns upon the construction of s. 16 of the Electricity (Supply) Act, 1919, which gives a right to compensation to any workman who has suffered loss of employment or diminution of wages in consequence of any transfer scheme "within five years from the date when . . . . a scheme for the improvement of the supply of electricity in any district has come into operation." The difficulty arises owing to the double use of the word "scheme." It is used in the Order as constituting the East Midlands Electricity District and establishing the East Midlands Electricity Advisory Board; it is also used in para. 11 of the Schedule to the Order which deals with "the Technical Scheme for the improvement of the supply of

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electricity in the district." The word "scheme" in s. 16 means "Technical Scheme," because it is that Scheme which deals with the shutting down of generating stations and so causes loss of employment or diminution of wages to the workmen employed therein. The Technical Scheme is expressed to come into operation by a series of successive steps. The Advisory Board constituted under the Scheme have no power under para. 11, sub-para. 2, of the Schedule to the Order to compel the Technical Scheme to be brought into operation; all they can do is to take all steps within their power to secure the carrying into effect of the Technical Scheme. The Board may advise the Commissioners, but it is the Commissioners who have to make any effective orders as regards the carrying out of the Scheme itself or any modification of the Scheme. The Board is purely an advisory board. The sole issue is whether the claims for compensation were made within the period of "five years from the date when . . . . a scheme for the improvement of the supply of electricity in any district has come into operation." If the date when Parliament approved the Order giving effect to the Scheme is the material date the claims for compensation are out of time. It is, however, necessary to look at what s. 16 is aimed at. That section is dealing with workmen who would suffer loss of employment or diminution of wages, not by the setting up of an Advisory Board or the delimitation of an electricity district, but by the operation of a Technical Scheme for the improvement of the supply of electricity in a district. The section contemplated the technical improvements brought about by the Technical Scheme which operated by the closing down of the smaller generating stations. No generating stations were shut down by the mere making of the Order, and the creation of the Advisory Board or the delimitation of the district. For the purpose of s. 16 the Order did not come into operation as soon as it was made. In the present case improvement of the supply of electricity in a district could not take place merely by the setting up of an Advisory Board; it could only be done by means of the Technical Scheme. As far as the workmen who were not transferred to the generating station at Freeman's Meadows are concerned the Scheme did not come into operation until the two generating stations, Lero and Aylestone, were closed. It could not have been intended that by a variation of the Scheme by the Electricity Commissioners in delaying the closing down of those two generating stations the rights of the workmen to compensation should thereby be defeated. There can be no improvement in the supply of electricity in any district until a technical scheme has become operative. The intention of the Legislature, as expressed in s. 16, was to give a man a period of five years within which to claim compensation after he has suffered loss by the shutting down of a generating station.

R. M. Montgomery K.C. and *Richard O'Sullivan* for the Corporation. The intention of the Legislature in enacting s. 16 of the Act of 1919 was to prevent any change that might be brought about as a result of the operation of the statute being considered as one of the risks of employment, and therefore it was provided that after the Act had become operative by the transfer of an undertaking or by the making of a Scheme for the improvement of the supply of electricity five years period of employment should be secured to the workmen affected or they should be paid compensation. The time was to run from the date when the Scheme for the improvement of the supply of electricity in a district came into operation. That date had already been fixed by s. 7, which provided in sub-s. 2 that an Order giving effect to a Scheme for the improvement of the supply of electricity in a district "shall not come into operation unless and until it has been approved . . . . by a resolution passed by each" House of Parliament, "and when so approved shall have effect as if enacted in this Act." The East Midlands Electricity District Order, 1923, having previously been approved by the House of Commons, was approved by the House of Lords on June 4, 1924, and therefore came into operation on that date. The Order recites that the Scheme embodying the decisions which the Commissioners arrived at was set out in the Schedule to the Order. Para. 3 of the Order provides that "the Scheme set out in the Schedule to this Order shall operate and have effect," and para. 4 provides that "this Order shall come into operation as soon as it has been approved by a resolution passed by each House of Parliament." The only Scheme that is mentioned in the Act of 1919 is one for the improvement of the existing organization for the supply of electricity; there is no reference in the Act or in s. 16 thereof to a Technical Scheme. Sect. 16 refers only to the Scheme that the other sections in the Act have been dealing with, and does not intend to refer to a Scheme for the improvement of the supply of electricity for a district as being something distinct from a Scheme for the improvement of the existing organization for the supply of electricity. The term "Technical Scheme" is first mentioned in para. 11 of the Schedule to the Order and is there carefully distinguished from the Scheme approved in the Order. The main outlines of the Technical Scheme are set out in the Second Annex to the Schedule, but para. 11 expressly provides that that "Annex shall be deemed to form part of this Scheme and shall have effect accordingly." Therefore the Technical Scheme is only a portion of the Scheme and came into operation along with the rest of the Scheme on June 4, 1924, when the Order was approved by a resolution of the House of Lords.

Hon. Sir Stafford Cripps K.C. in reply. There is no suggestion in the Order that the Scheme shall come into operation on the same day as the Order, only that it shall operate and have effect. Having regard to the identity of phraseology in the wording of para. 11 of the Schedule to the Order and s. 16 of the Act, it follows that the Scheme which is being referred to in the section is the Technical Scheme, and that never came into operation at all so far as the claimants were concerned until the generating stations in which they were employed were actually closed down under that Scheme.

MacKinnon J. This is a Special Case stated by Sir Harold Morris K.C. as a referee appointed by the Minister of Labour under the provisions of s. 16 of the Electricity (Supply) Act, 1919. The matter that the learned referee was concerned with was to decide a claim by certain employees of the Leicester Corporation at their Lero and Aylestone Electricity Generating Stations under s. 16 of the Act of 1919, those employees alleging that in consequence of that Act they had suffered a loss of employment or diminution of wages and were therefore entitled under s. 16 to compensation in respect of that loss. Sir Harold Morris has found that they have suffered a loss of employment or a diminution of wages in consequence of the Act. The provisions of s. 16 providing for this sort of compensation are, however, in these terms: "If . . . . within five years from the date when under this Act . . . . a scheme for the improvement of the supply of electricity in any district has come into operation," any employee proves that in consequence of the Act he has suffered loss of employment or diminution of wages, then and only under those conditions can he recover compensation. The point which was argued before the referee and has been debated before me is whether the Corporation were right in saying that though the workmen had suffered loss of employment or diminution of wages in consequence of this Act, yet that loss of employment or diminution of wages was not incurred within five years from the date when under this Act the Scheme in question came into operation. They suffered their loss of employment or diminution of wages in August and September, 1930, when the Lero and Aylestone Generating Stations were closed down, and the question therefore is whether that event, happening in August and September, 1930, is or is not more than five years from the date when the Scheme under the Act came into operation? The phrase in s. 16, "a scheme for the improvement of the supply of electricity in any district has come into operation" must clearly refer back to such mention as has already been made of a scheme of that nature. The first mention of a scheme of that nature occurs in s. 5. The Electricity Commissioners under that section may determine the districts constituting electricity districts for the purposes of the Act. Then sub-s. 2 provides that where in the opinion of the Commissioners "the existing organisation for the supply of electricity" in any electricity district can be improved, the Commissioners may allow a scheme or schemes for effecting such improvement to be submitted by the existing electricity authorities and other local authorities, but if no such scheme is submitted the Commissioners may themselves formulate a scheme. Sub-s. 4 provides that they shall publish any scheme which they have approved or formulated and hold a local inquiry thereon. In that way a scheme for any particular district comes into existence. Sect. 6 goes on to specify that a scheme may provide for a Joint Electricity Authority which, in effect, shall take over the undertakings of the existing electricity undertakers and themselves exercise all the powers of the authorized undertakers in the district, and really be an authority that produces and distributes electricity. The section does not mention the type of Scheme which in fact the Electricity Commissioners formulated in regard to this district, which is of the nature of a Scheme for an Advisory Board which had representatives on it of the various existing authorities, and which was rather of the nature of a coordinating and advisory body than one with any administrative powers. It is not, however, suggested that such an advisory committee might not properly be brought into existence under this Act by the Commissioners. Then s. 7 provides: "The Electricity Commissioners may make an order giving effect to the schemes embodying decisions they arrive at as the result of such inquiry as aforesaid, and present the order for confirmation by the Board of Trade, who may confirm the order either without modification or subject to such modifications as they think fit." Therefore, the modus operandi is that the Electricity Commissioners publish the scheme which they have approved, and have it debated at a public inquiry, and then they can upon such terms as they think fit make an Order themselves giving effect to it. That Order has to be confirmed by the Board of Trade. But then it is provided by sub-s. 2: "Any such order"—that is the Order of the Electricity Commissioners—"shall be laid, as soon as may be after it is confirmed before each

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House of Parliament, but shall not come into operation unless and until it has been approved either with or without modification by a resolution passed by each such House, and when so approved shall have effect as if enacted in this Act." In the present case the Electricity Commissioners made an Order giving effect to the Scheme providing for the establishment of an advisory committee for this district. That Order was confirmed by the Board of Trade (or by the Minister of Transport, see s. 39), and was subsequently laid before Parliament, and a resolution was passed in each House approving it. The approval of the House of Commons was given first at some date in May, 1924. The approval of the House of Lords was given by a resolution dated June 4, 1924. Thereupon the Order, having been approved by both Houses of Parliament, had effect "as if enacted in this Act." Those being the sections dealing with a scheme and an Order for giving effect to a scheme, and a scheme coming into effect by virtue of such an Order, I think that the material date at which this Scheme came into operation within the meaning of those words in s. 16 was June 4, 1924, when the approval of the second of the two Houses that did approve it—namely, the House of Lords, was given, that being the date on which the Order giving effect to the Scheme was to have effect "as if enacted in this Act." Therefore, I think, any claim under s. 16 in respect of a loss of employment referred to under this Act, must be made within five years from June 4, 1924. That did not happen in the present case, because those five years elapsed on June 4, 1929, and the closing down of these two generating stations took place rather more than a year after that date.

It was apparently argued before Sir Harold Morris on behalf of the claimants that the Scheme did not come into operation until the Lero and Aylestone Generating Stations were closed down, which was the same date as that on which they lost their employment. But Sir Stafford Cripps has not put forward that argument here. He has argued that the word "scheme" in s. 16 does not mean the Scheme for the establishment of the advisory body for the district, but means the Technical

Scheme or the technical reorganization of the existing electricity works in the district which is referred to and named as a Technical Scheme in the Second Annex to the Schedule to the Order. In that Annex are set out the main outlines of the "Technical Scheme," a Technical Scheme which involved the building, or the continued building, of the Leicester Corporation Freeman's Meadows Generating Station, the erection of which had been already commenced by the Corporation as long ago as 1922, and, when that station was fully in operation, the ultimate closing of the Lero and Aylestone Generating Stations. I am not sure what precise date under that contention is selected for the coming into operation of the Scheme. I think it was said that it was the date when the Technical Scheme was, so to speak, started off in its actual operation—namely, December 21, 1925, when the Advisory Board under the Scheme confirmed the recommendation of the Electricity Engineers Committee about the carrying out of this Technical Scheme. In my opinion that argument fails in two respects. First of all, I do not think that it is right to say that the "scheme" in s. 16 means this Technical Scheme. Secondly, I think, that even if it were this Technical Scheme referred to and embodied in the Schedule to the Scheme, Mr. Montgomery is right in saying that after all the Technical Scheme is only part of the same Scheme, and that it also came into operation, if it is the proper Scheme to be considered, when the Order was made embodying it, confirmed by the Board of Trade and approved by a resolution passed by each of the Houses of Parliament. Therefore, if one looks at that subordinate part of the whole Scheme as being the Scheme referred to in s. 16, it really came into operation on the same date as is arrived at by taking the other as being the Scheme referred to.

In the result I think that the decision of Sir Harold Morris was correct in point of construction and of law and that his award must be confirmed.

Award upheld.

Solicitor for the claimants: *W. H. Thompson.*

Solicitors for Leicester Corporation: *Field, Roscoe & Co., for The Town Clerk, Leicester.*

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NOTE.

Electricity (Supply) Act, 1919. Sect. 5 provided by sub-s. 1 for the constitution of separate electricity districts by the Electricity Commissioners for the purposes of the Act.

Sub-s. 2: "Where it appears to the Electricity Commissioners with respect to any electricity district so provisionally determined that the existing organisation for the supply of electricity therein should be improved, the Commissioners shall give notice of their intention to hold a local inquiry into the matter, and shall give to authorised undertakers, county councils, local authorities, railway companies using or proposing to use electricity for traction purposes, large consumers of electricity, and other associations or bodies within the district which appear to the Commissioners to be interested, an opportunity to submit, within such time as the Commissioners may allow, a scheme or schemes for effecting such improvement, including proposals for altering or adjusting the boundaries of the district and, where necessary, the formation of a joint electricity authority for the district."

Sub-s. 3: "If no such scheme is submitted within the time so allowed, or if no scheme submitted is approved by the Commissioners, the Commissioners may themselves formulate such a scheme."

Sub-s. 4: "The Electricity Commissioners shall publish, in such manner as they think best adapted for ensuring publicity, any scheme which they have approved, with or without modifications, or which they have themselves formulated, and shall hold a local inquiry thereon."

Sect. 6, sub-s. 1: "A scheme under the last-foregoing section may provide for the establishment and (where desirable) the incorporation with power to hold land without licence in mortmain, of a joint electricity authority representative of authorised undertakers within the electricity district, either with or without the addition of representatives of the council of any county situate wholly or partly within the electricity district, local authorities, large consumers of electricity, and other interests within the electricity district, and, subject as hereinafter in this Act provided, for the exercise by that authority of all or any of the powers of the authorised undertakers within the electricity district, and for the transfer to the authority of the whole or any part of the undertakings of any of those undertakers, upon such terms as may be provided by the scheme, and the scheme may contain any consequential, incidental, and supplemental provisions which appear to be expedient or proper for the purpose of the scheme, including provisions determining the area included in the electricity district:

"Provided that no such scheme shall provide for the transfer to the authority of any part of an undertaking except with the consent of the owners thereof."

Sub-s. 2: "The scheme may provide for enabling the joint electricity authority to delegate, with or without restrictions, to committees of the authority any of the powers or duties of the authority, and for the payment out of the revenues of the authority of travelling and subsistence expenses of members of the authority, and reasonable compensation for loss of remunerative time."

Sect. 7, sub-s. 1: "The Electricity Commissioners may make an order giving effect to the schemes embodying decisions they arrive at as the result of such inquiry as aforesaid, and present the order for confirmation by the Board of Trade [now the Minister of Transport, see s. 39], who may confirm the order either without modification or subject to such modifications as they think fit."

Sub-s. 2: "Any such order shall be laid, as soon as may be after it is confirmed before each House of Parliament, but shall not come into operation unless and until it has been approved either with or without modification by a resolution passed by each such House, and when so approved shall have effect as if enacted in this Act."

Sect. 16: "If after the eighth of May, 1919, and within five years from the date when under this Act a transfer of the whole or any part of an undertaking has been effected, or a scheme for the improvement of the supply of electricity in any district has come into operation, or an agreement or arrangement between various authorised undertakers for the rendering of mutual assistance to one another has been entered into, any officer or servant who has, before the said eighth day of May, been regularly employed in or about the undertaking or any authorised undertaking proves to the satisfaction of a referee or a board of referees appointed by the Minister of Labour that in consequence of the Act, he—

(i) has suffered loss of employment, or diminution of salary, wages or emoluments, otherwise than on grounds of misconduct, incapacity, or superannuation; or

(ii) has relinquished his employment in consequence of being required to perform duties such as were not analogous or were an unreasonable addition to those which before the said eighth day of May he had been required to perform; or

(iii) has been placed in any worse position in respect to the conditions of his service (including tenure of office, remuneration, gratuities, pension, superannuation, sick or other fund, or any benefits or allowances, whether obtaining legally or by customary practice),

and the body to which the undertaking or part thereof was transferred, or, as the case may be, the authorised undertakers who are affected by the scheme or are parties to the agreement or arrangement, do not show to the satisfaction of the referee or board of referees that equivalent employment on the like conditions as those obtaining with respect to him, at the date when the scheme comes into operation, or the agreement or arrangement is entered into, was available, there shall be paid to him by that body or those undertakers, or such of them as the referee or board of referees may think just, such compensation as the referee or board of referees may award, including any expenses which the officer or servant necessarily incurs in removing to another locality: . . . ."

Electricity (Supply) Act, 1922, s. 19: "Sect. five of the principal Act [Electricity (Supply) Act, 1919 (see s. 1, sub-s. 2, of the Act of 1922)] (Electricity districts) shall have effect as if after the word 'authority,' in sub-s. (2) of that section, there had been inserted the words 'or other body'."

Sect. 21, sub-s. 1: "Sect. sixteen of the principal Act shall have effect as if for the words 'under this Act' there were substituted the words 'under or in consequence of this Act,' and as if for the words 'in consequence of this Act' there were substituted the words 'in consequence of any such transfer scheme, agreement or arrangement': . . . ."

Electricity (Supply) Act, 1928, s. 1: "Sect. sixteen of the Electricity (Supply) Act, 1919, shall have effect as if the words 'before the said eighth day of May' wherever they occur in that section were omitted."

Order made by the Electricity Commissioners under s. 7 of the Electricity (Supply) Act, 1919, constituting the East Midlands Electricity District and establishing the East Midlands Electricity Advisory Board. The Order recited that the Electrical Commissioners had provisionally determined that a certain area should be constituted a separate electricity district for the purposes of the Electricity (Supply) Act, 1919; that it appeared to the Commissioners that the existing organisation for the supply of electricity in that district should be improved; that the Commissioners had given an opportunity to the various bodies interested to submit Schemes for effecting the improvement; that a Scheme had been submitted, and a local inquiry held, and the Scheme had been published with certain modifications and the Commissioners had held an inquiry thereon; and that the published Scheme with such further modifications as were necessary for embodying therein the decisions which the Commissioners arrived at as the result of such last mentioned inquiry was set out in the Schedule to the Order. The Commissioners in pursuance of the powers conferred upon them by s. 7 of the Electricity (Supply) Act, 1919, ordered (inter alia) as follows:

"1. This Order may be cited as the East Midlands Electricity District Order, 1923."

"3. The Scheme set out in the Schedule to this Order shall operate and have effect, and accordingly the East Midlands Electricity District shall be and is hereby finally determined, and the East Midlands Electricity Advisory Board shall be and is hereby established.

"4. This Order shall come into operation as soon as it has been approved by a resolution passed by each House of Parliament."

SCHEDULE.

Scheme constituting the East Midlands Electricity District and establishing the East Midlands Electricity Advisory Board.

Para. 1 dealt with the constitution of the district.

Para. 2: "In order to provide for the improvement of the existing organisation for the supply of electricity within the district there shall be established an Electricity Advisory Board under the name of the East Midlands Electricity Advisory Board (hereinafter called 'the Board') which shall exercise within the district the powers and authorities by this Scheme conferred upon it."

Para. 3 dealt with the constitution of the Advisory Board.

Para. 4 dealt with the appointment and remuneration of officers and servants.

Para. 5 dealt with the expenses of members.

Para. 6: "The Board shall appoint at their first meeting and thereafter annually in the month of April an Engineering Advisory Committee (hereinafter called 'the Engineers Committee') consisting of the members nominated by the constituent bodies as set out in Part III. of the First Annex hereto."

Para. 7 dealt with the co-optation of railway engineers.

Para. 8 dealt with the appointment of other committees.

Para. 9 dealt with the institution and carrying on or the defending of legal proceedings by the Board.

Para. 10 dealt with the offices of the Board.

Para. 11: "(1.) The main outlines of the Technical Scheme for the improvement of the supply of electricity in the district, to which the general approval of the Commissioners is hereby given, are set forth in the Second Annex hereto which Annex shall be deemed to form part of this Scheme and shall have effect accordingly.

(2.) The Board shall take all steps within their power to secure the carrying into effect of the Technical Scheme, which may be modified or varied with the approval of the Commissioners."

Para. 12: "The Board shall within a period of two years from the commencement of the Order giving effect to this Scheme or within such extended time as may be approved by the Commissioners submit to the Commissioners proposals for securing the supply of electricity in any area within the district (not forming part of the area of supply of any authorised distributors) in which there is a demand for a supply of electricity and a reasonable prospect of such supply being remunerative."

Para. 13: "(1.) The Board may from time to time and shall if so required by any constituent body or bodies or by the Commissioners take into consideration investigate and make recommendations to the constituent bodies or such of them as may be affected and to the Commissioners upon any matter connected with the improvement and development of the supply of electricity in the district or any part thereof."

Para. 14: "A constituent body shall have the right of making representations to the Commissioners in respect of any recommendation of the Board affecting such constituent body and the Commissioners shall before giving any decision on the matter in question take into consideration such representations. The decision of the Commissioners shall subject and without prejudice to any statutory rights and obligations of the constituent body or bodies concerned or affected thereby be binding upon the said constituent body or bodies and such body or bodies shall take all steps necessary to give effect to such decision."

Para. 15 provided that nothing in the Scheme was to relieve any authorised undertaker from the necessity of obtaining consents which would otherwise have been required.

Para. 16 gave the Board the right to enter upon and inspect the generating stations and main transmission lines of any undertaker.

Para. 17 required constituent bodies to furnish statistics to the Board.

Para. 18 dealt with the expenses of the Board.

Para. 19 dealt with demands to be issued to each constituent body stating the sum to be contributed by such body.

Para. 20 provided that the constituent bodies should meet the demands.

Paras. 21 and 22 provided for accounts of the income and expenditure of the Board and for an audit of the accounts.

Para. 23 provided for an annual report of the Board.

Para. 24 provided that a certain agreement should form part of the Scheme.

FIRST ANNEX.

Part I. dealt with the qualification and appointment or election of members and proceedings of the Electricity Advisory Board.

Part II. dealt with the members to be appointed or elected by constituent bodies.

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Part III. dealt with the members to be appointed of the engineers' committee.

SECOND ANNEX.

Main Outlines of Technical Scheme.

"2. The following generating stations belonging to the authorised undertakers respectively specified to be utilised under the Scheme and to be extended as may hereafter be determined.

Station	owned by	Undertakers.
Freeman's Meadows ..	.. .. ..	Leicester Corporation.

[4 other stations.]

"3. The following generating stations belonging to the authorised undertakers respectively specified to be utilised under the Scheme until the load can be transferred to the new stations belonging to the same undertakers.

Station	owned by	Undertakers.
Lero .. Aylestone	.. ..	Leicester Corporation.

[3 other stations.]

"4. The following generating stations belonging to the authorised undertakers respectively specified to be utilised under the Scheme until such time as other supplies become available at rates justifying the shutting down of the stations in question."

[List of 4 stations follows.]

"5. In order to make effective use of the generating stations to be retained or under construction and to supplement existing interconnecting cables, a Scheme of main transmission lines to be prepared by the Board and submitted to the Commissioners within six months from the date of the commencement of the Order giving effect to this Scheme connecting inter alia the generating stations at Leicester (Freeman's Meadows), North Wilford and Spondon with Burton-upon-Trent, Coalville, Derby, Heanor, Long Eaton, Loughborough and Mansfield."

"7. A scheme providing for the control of generating stations in the district when interconnected to be prepared by the Advisory Board within twelve months from the date of the commencement of the Order giving effect to this Scheme or within such further time as the Commissioners may allow and to be submitted to the Commissioners for their approval . . . ."

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Criminal Law—Habitual Criminal—Proof of Three previous Convictions—Convictions in Scotland—Whether admissible—" Crime "—Prevention of Crimes Act, 1871 (34 *&* 35 *Vict. c.* 112), *ss.* 18, 20—*Prevention of Crime Act,* 1908 (8 *Edw.* 7, *c.* 59), *ss.* 10, 17.

Prevention of Crime Act, 1908, s. 10, sub-s. 2: " A person shall not be found to be a habitual criminal unless the jury finds on evidence —(*a*) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime. . . . ."

Sub-s. 6: " For the purposes of this section the expression 'crime' has the same meaning as in the Prevention of Crimes Act, 1871, and the definition of 'crime' in that Act, set out in the schedule to this Act, shall apply accordingly."

Sect. 17, sub-s. 2: " In the application to Scotland of the provisions of this Act . . . . the expression 'crime,' used in reference to previous convictions, means a crime of which a person has been convicted on indictment."

Sub-s. 4: " Sub-s. (6) of s. ten shall not apply to Scotland."

The Schedule to the Act provided that " the expression 'crime' means, in England and Ireland, any felony or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanour under the fifty-eighth section of the Larceny Act, 1861."

Prevention of Crimes Act, 1871, s. 18: ". . . . A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom. . . . ."

Upon a charge against a person in England of being a habitual criminal under s. 10 of the Prevention of Crime Act, 1908, a previous conviction of that person in Scotland upon indictment of a crime may be proved as one of the three previous convictions of a crime which must be proved against him under s. 10, sub-s. 2, before he can be found to be a habitual criminal, provided that the offence of which he was convicted in Scotland would also be a " crime " in England within the definition of that expression as set out in the Schedule to the Prevention of Crime Act, 1908.

Appeal against a conviction and sentence at the Central Criminal Court.

The appellant was charged at the Central Criminal Court with burglary, and also with being a habitual criminal. He pleaded guilty to the charge of burglary, and was sentenced to three years' penal servitude. He pleaded not guilty to the charge of being a habitual criminal. He was found by the jury to be a habitual criminal, and was sentenced to five years' preventive detention.

The appellant appealed against the finding that he was a habitual criminal and the sentence of preventive detention.

The notice that was served upon the appellant by the Director of Public Prosecutions, in pursuance of s. 10, sub-s. 4, of the Prevention of Crime Act, 1908, that it was intended to charge him with being a habitual criminal, specified as particulars of three previous convictions of a crime, three convictions in Scotland: (1.) on July 1, 1924, at Edinburgh Sheriff Court, for shopbreaking with intent to steal, when appellant was sentenced to two years' penal servitude and 522 days' remanet of sentence; (2.) on June 26, 1927, at the same court, for housebreaking and stealing, when the appellant was sentenced to two years' imprisonment and 130 days' remanet of sentence; (3.) August 30, 1929, at the Edinburgh High Court, for housebreaking and stealing, when the appellant was sentenced to three years' penal servitude. In the record of the first conviction the sentence was stated to be: "the said panel to be imprisoned for two years from this date and thereafter to be at liberty." In the record of the second conviction the date of the conviction was stated to be June 21, 1927.

The appellant raised two points as to the finding that he was a habitual criminal: (1.) That the three statutory convictions, all of which took place in Scotland, were not such convictions as were necessary to constitute him a habitual criminal in England. (2.) That the evidence given of two statutory convictions was not in accordance with the notice served by the Director of Public Prosecutions.

Albert Crew for the appellant. The appellant appeals against the finding of the jury that he is a habitual criminal. That finding was under s. 10 of the Prevention of Crime Act, 1908, which being a penal statute ought to be construed strictly. Under s. 10, sub-s. 2, of the Act of 1908, "A person shall not be found to be a habitual criminal unless the jury finds on evidence—(*a*) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime. . . . ." In the present case the three convictions that were sought to be proved against the appellant were all convictions in Scotland. Those convictions were not admissible in evidence against the appellant in proof of the charge that he is a habitual criminal. The Prevention of Crime Act, 1908, draws a distinction between England and Ireland on the one hand and Scotland on the other. Sect. 10, sub-s. 6, provides that "For the purposes of this section the expression 'crime' has the same meaning as in the Prevention of Crimes Act, 1871, and the definition of 'crime' in that Act, set out in the schedule to this Act, shall apply accordingly." The Schedule provides as follows: "The expression 'crime' means, in England and Ireland, any felony or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanour under the fifty-eighth section of the Larceny Act, 1861." That definition is taken from s. 20 of the Prevention of Crimes Act, 1871, which section also contains a definition of the expression "crime" in Scotland, but that definition is omitted from the Schedule. Further, s. 17, sub-s. 4, of the Act of 1908 provides that "sub-s. (6) of s. ten shall not apply to Scotland"; and sub-s. 2 of s. 17 provides that "In the application to Scotland of the provisions of this Act . . . . the expression 'crime,' used in reference to previous convictions, means a crime of which a person has been convicted on indictment." It is possible that under that definition a person might be convicted in Scotland of an offence which was a crime there because it was punishable on indictment and yet not come within the definition of a crime in England as set out in the Schedule to the Act of 1908. The Act of 1908, which contains the machinery for dealing with the determination of a person as being a habitual criminal, contains no provision for a conviction of a crime in Scotland being regarded as one of the three convictions of a crime which must be proved before a person can be found to be a habitual criminal. It is true that s. 18 of the Prevention of Crimes Act, 1871, provides that "A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom," but although proof of the previous convictions in Scotland can be given in England, it does not make those previous convictions in Scotland part of the ingredients necessary for finding a person to be a habitual criminal. The prosecution ought to have proved that the offences of which the appellant was convicted in Scotland were crimes according to the law of Scotland. It is stated in Halsbury's Laws of England, vol. xiii., p. 485, art. 672, that "questions of Scottish law must be decided as questions of fact upon evidence in all English Courts except the House of Lords." In the present case no expert in Scottish law was called to prove that the offences for which the appellant had been convicted in Scotland were crimes according to the law of Scotland. The three statutory convictions were not proved in accordance with the notice given to the appellant. In one case the dates on the notice and record were different, and in another case the notice stated that the appellant had been sentenced to two years' penal servitude and 522 days' remanet of sentence, whereas the record of the conviction was that the appellant was sentenced to two years' imprisonment from the date of the conviction and thereafter to be at liberty. The discrepancy between the two documents constitutes a fatal objection to the finding that the appellant was a habitual criminal being a good finding, as the requirements of the statute have not been strictly complied with.

H. T. Wright for the Crown. The Prevention of Crime Act, 1908, applies equally to England, Ireland, and Scotland. The appellant was convicted three times in Scotland on indictment, and therefore if the proceedings with regard to the man being found to be a habitual criminal had taken place in Scotland there is no question but that the three previous convictions could have been proved as showing that the man had three times previously been convicted of a crime. But as the proceedings with regard to the appellant being a habitual criminal have taken place in England, in order to prove the three previous convictions in Scotland it is necessary to pray in aid s. 18 of the Prevention of Crimes Act, 1871, which says that "a previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom." The first paragraph of the section provides that "a previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted." Those formalities were complied with in the present case. The three convictions on indictment in Scotland were all for offences which if tried in England would have been felony, and therefore were properly provable in this country.

[Finlay J. A person might be convicted on indictment in Scotland of an offence which would come within the definition of "crime" as given in s. 17, sub-s. 2, of the Act of 1908, but which if committed in England would not come within the definition of "crime" set out in the Schedule to that Act, as, for example, perjury. Would proof of such a conviction be admissible in this country in support of the allegation that a man is a habitual criminal ?]

No. In order that a conviction in Scotland on indictment for a crime shall be admissible in this country as proof that a person is a habitual criminal, the offence for which the man was convicted on indictment in Scotland must also be a crime in this country within the definition of "crime" as set out in the Schedule to the Act of 1908, that is the conviction must have been for an offence which would be a felony in England or else one of the specified offences.

Albert Crew replied.

The judgment of the Court (Lord Hewart C.J., Finlay and Humphreys JJ.) was delivered by

Humphreys J. The appellant in his second notice of appeal stated the grounds of his appeal as follows : (1.) That

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the statutory convictions which were alleged by the prosecution were not admissible in evidence against him: the Prevention of Crime Act, 1908, s. 10, sub-s. 2 (*a*); (2.) that the three statutory convictions were not proved precisely as specified in the notice given to the appellant under the Prevention of Crime Act, 1908, s. 10, sub-s. 4 (*b*). To deal first with the second of the two grounds. It appears to be the fact that in the notice served upon the appellant by the Director of Public Prosecutions that it was intended to charge him with being a habitual criminal on the ground that he had three times previously been convicted of a crime, one of the particulars given was that the appellant had been convicted at Edinburgh Sheriff Court on June 1, 1924, of shopbreaking with intent to steal and sentenced to two years' penal servitude and 522 days' remanet of sentence. It was the fact that he had to serve a remanet of 522 days of a previous sentence in addition to his fresh sentence. But the certificate produced from the Edinburgh Sheriff Court is to the effect that the sentence was for two years' imprisonment only. The appellant takes the point that the notice and record are inconsistent, and says that is a fatal objection. This Court, however, do not think that that is so. The only point of giving notice is that the appellant may have notice of what is alleged against him. The fact that the 522 days' remanet did not appear in the record does not make the notice in the least degree a bad notice. It is also said that the date of one of the three convictions was given in the notice as June 26, 1927, whereas in the record the date of the conviction was given as June 21. The Court do not think there is anything in this point.

The other point stated in the grounds of appeal, and which was argued at the trial, is that the three convictions which under the Prevention of Crime Act, 1908, must be proved strictly in order to convict a man of being a habitual criminal, were all convictions in Scotland, and it was contended that a conviction in Scotland of any character could not be described as a conviction of a crime within the meaning of s. 10 of the Act of 1908. The expression "crime" is declared

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by sub-s. 6 of s. 10 to have the same meaning as in the Prevention of Crimes Act, 1871. That definition, so far as England and Ireland are concerned, is set out in the Schedule to the Act of 1908, but it is left out so far as Scotland is concerned. The Act of 1908 is, however, made by s. 17 to apply to Scotland with certain exceptions and explanations. In the application of the Act to Scotland the expression "crime" used in reference to previous convictions is defined in sub-s. 2 of s. 17 as meaning "a crime of which a person has been convicted on indictment." In the view of this Court it is quite clear, reading the two Acts together, that a crime which in Scotland is punishable on indictment, and which is also a crime within the definition of "crime" in the Prevention of Crime Act, 1908, is a crime, a conviction of which in Scotland may be taken into consideration, and which may form one of the three statutory convictions which have to be proved before a prisoner can be found to be a habitual criminal. In the opinion of this Court, in order that that result may follow, the crime must be an indictable offence in England as well as in Scotland, and must also come within the definition of crime as set out in the Schedule to the Act of 1908. In the present case it is quite clear that the offences of which the appellant had been convicted in Scotland were crimes in England as well as offences in Scotland, as two of the convictions were for housebreaking and stealing and one for shopbreaking with intent to steal. In the view of the Court the point fails, and the three convictions of the appellant in Scotland were quite properly treated as the three convictions of crimes which must be proved in considering the question whether a man is a habitual criminal.

Appeal dismissed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for Crown: *Director of Public Prosecutions.*

R. F. S.

1931
Dec. 21.

KOFFMAN *v.* SUNSHINE.

County Court—Costs—Jurisdiction of Superior Court—Preliminary Point—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 131.

The County Courts Act, 1888, s. 131, provides that upon an application for an order in lieu of mandamus directed to a county court judge: "the High Court may make such order as to costs as to it shall seem fit":—

Held, that this section enables the High Court to make an order as to costs incurred in the county court, and not merely as to costs in the proceedings before the Court itself.

Gage v. *Collins* (1867) L. R. 2 C. P. 381, and *Whitehead* v. *Procter* (1858) 3 H. & N. 532 followed.

Churchward v. *Coleman* (1866) L. R. 2 Q. B. 18 not followed.

MOTION.

In May, 1931, the plaintiff brought an action in the Southampton County Court claiming against the defendant and another a declaration of partnership, an account, and 47*l.* as his share of the partnership assets. The defendant denied the partnership, and took the objection that the court had no jurisdiction to entertain the action. The judge upheld the objection and dismissed the action with costs. The plaintiff then obtained an order nisi calling upon the judge to show cause why he should not proceed to hear and determine the action, and on November 18, 1931, this order was made absolute by the Divisional Court on the ground that the judge had the jurisdiction necessary to hear the action: *Koffman* v. *Sunshine.* (1)

The defendants appealed from this order to the Court of Appeal, but the appeal was dismissed: see sub nom. *Rex* v. *Judge Lailey. Ex parte Koffman.* (2)

The plaintiff brought this motion before the Divisional Court, asking that the defendants be ordered to pay the costs thrown away by reason of the county court judge refusing to hear the case in the first instance, on the ground of alleged lack of jurisdiction.

Ashe Lincoln for the plaintiff. Both this Court and the Court of Appeal have found that the county court judge was

(1) [1931] W. N. 265.

(2) [1932] W. N. 6.

wrong in deciding that he had no jurisdiction to try the case, and the plaintiff is entitled to the costs of the abortive hearing: *Gage* v. *Collins.* (1) In that case Willes J. said: "The question then arises, whether, on reversing the judgment and ordering a new trial, under 13 & 14 Vict. c. 61, s. 14, we set aside the order of the Court below with respect to costs. Different opinions have been expressed by the Courts of Exchequer and Queen's Bench respecting the power of the superior courts over the costs of the Court below under an analogous section—19 & 20 Vict. c. 108, s. 43—the former, in *Whitehead* v. *Procter* (2), holding that the superior court had power over them, the latter, in *Churchward* v. *Coleman* (3), that it had not. We think, in the case of an appeal at least, the costs of the Court below must have been intended to be dealt with as accessory to the judgment appealed from, and that the judgment being reversed, the order for payment of costs falls also." The County Courts Act, 1888, s. 131, provides that the High Court in making an order in lieu of mandamus, directed to a county court judge, may make "such order with respect to costs as to it shall seem fit." This includes an order as to costs in the court below.

J. P. Eddy for the defendants. The plaintiff should have applied to the Court of Appeal, when the case was before them, to vary the order for costs in the county court. It is now too late to do so. By the Rules of the Supreme Court, Order LVIII., r. 6, the respondent on appeal may, provided that he gives notice to the other parties affected, "contend that the decision of the Court below should be varied." In *Gage* v. *Collins* (4) the Court only decided that when a judgment of the county court is set aside an order can be made as to the costs of the trial. In *Rex* v. *Mellor* (5) the Divisional Court, in making an order under s. 131 of the County Courts Act, 1888, directing a judge to hear and determine an action which he has refused to hear, would not order the county court judge to pay the costs thrown away in the county court. In that case Swinfen Eady L.J. said: "The judge was not a party to that litigation, and the only costs in the discretion of the Divisional Court were the costs of the proceedings before it: *Churchward* v. *Coleman.* (1)" Where the appeal is from the decision of the county court judge upon a preliminary point, this Court has no jurisdiction to set aside the order as to costs in the Court below. The Court can only deal with the costs of the proceedings before it. The present case is directly covered by *Churchward* v. *Coleman.* (1) It turns upon a plain reading of s. 131 of the County Courts Act, 1888. The concluding words of that section, that "in any event, the High Court may make such order with respect to costs as to it shall seem fit," refer only to the costs of the proceedings before the High Court, and not to costs in the county court.

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(1) L. R. 2 C. P. 381, 382.
(2) 3 H. & N. 532.
(3) L. R. 2 Q. B. 18.
(4) L. R. 2 C. P. 381.
(5) [1914] 2 K. B. 588.

Ashe Lincoln in reply. *Rex* v. *Mellor* (2) dealt with the power of the High Court to order the costs of proceedings in the county court to be paid by the judge personally. Upon this ground it was impossible to make an order against the judge for payment of costs. The decision is not an authority against the present application, which is for an order for payment of costs by the party who has been in the wrong.

AVORY J. [after stating the facts, continued:] The applicant asks that this Court should direct the county court judge to vary his order as to costs: that is to say, that the existing order should be set aside and the defendants ordered to pay the costs of the abortive hearing in the county court.

In the course of the argument reference was made to *Whitehead* v. *Procter* (3) and to *Churchward* v. *Coleman.* (1) In the former case the Court of Exchequer held that where an order was granted to correct the decision of the county court judge on a preliminary matter it was within the power of the Court to deal with the question of costs. In the latter case it was laid down by the Court of Queen's Bench that this Court had no such power. The previous application to this

(1) L. R. 2 Q. B. 18.

(2) [1914] 2 K. B. 588.

(3) 3 H. & N. 532.

Court related to the jurisdiction of the county court judge, and in deciding it we gave liberty to apply. Mr. Eddy has argued that the plaintiff cannot now renew the application, and he relies upon Order LVIII., r. 6. That rule provides that the respondent in the Court of Appeal can, upon notice to the other side, "contend that the decision of the Court below should be varied." The short answer to this is that there is at present no decision of this Court as to the costs in the county court, and therefore it could not be contended that the order of this Court is wrong. No decision exists which could be varied. The question is whether upon this renewed application we can make the order asked. The point arose in *Gage* v. *Collins* (1), in which the two earlier cases of *Whitehead* v. *Procter* (2) and *Churchward* v. *Coleman* (3) were considered. In *Gage* v. *Collins* (1) the Court had to deal with an appeal from the decision of a county court judge on an interpleader issue. The county court judge had given judgment for the execution creditor with costs. The Court of Common Pleas (Willes, Keating, and Montague Smith JJ.) reversed this judgment, including that part of it which related to costs. The statute then in force upon the question was 13 & 14 Vict. c. 61, s. 14, which provided: "the said Court of Appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make such order with respect to the costs of the said appeal as such Court may think proper."

I think that s. 131 of the County Courts Act, 1888, is of wider operation than the provision of this earlier statute. The words in s. 131 are "and, in any event, the High Court may make such order with respect to costs as to it shall seem fit."

With regard to the authorities, I prefer to follow the decision in *Gage* v. *Collins* (1) rather than that in *Churchward* v. *Coleman*. (3) In *Rex* v. *Mellor* (4) the Court of Appeal had before it, upon an appeal from the Divisional Court, the

(1) L. R. 2 C. P. 381.
(2) 3 H. & N. 532.
(3) L. R. 2 Q. B. 18.
(4) [1914] 2 K. B. 588.

question whether a county court judge should be ordered personally to pay the costs thrown away by his refusal to hear an action. The judge was not a party to the litigation, and the Court of Appeal held that it had no jurisdiction to order him to pay the costs personally. The question before the Court of Appeal in that case was a very different one from the question which is before us to-day. It is obvious that the only way to do justice in the present case is to set aside the order of the county court judge as to costs, and to order the defendants to pay the costs of the abortive proceedings there.

HAWKE J. Apart from the authorities, I should have thought that the object of s. 131 of the County Courts Act, 1888, and of the previous statute upon this point, was to enable this Court to dispose of the whole matter once for all. The authorities are conflicting. It is to be observed that *Gage* v. *Collins* (1) was not a case in which the applicant asked for an order in lieu of mandamus, but was an appeal from the judgment of the county court on an interpleader issue. That decision, however, gives strong support to the argument put before us by the applicant. For these reasons I agree with the judgment of Avory J. The order as to costs must be set aside.

HUMPHREYS J. I agree that the justice of the case requires that the order should be set aside, and that the defendant should pay the costs of the abortive proceedings in the county court.

Solicitors for plaintiff: *Bishop & Fenton-Jones.*

Solicitors for defendant: *Gustavus Thompson & Sons, for Max Turk, South Farnborough.*

F. P. F.

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(1) L. R. 2 C. P. 381.

MONTAGU STANLEY AND COMPANY *v.* J. C. SOLOMON, LIMITED, AND ANOTHER.

1932
Feb. 29.

Principal and Agent—Agreement to Share Commissions and Losses on Stock Exchange—Indemnity—Del credere Agency.

The defendants agreed in writing with the plaintiffs, stockbrokers on the Stock Exchange, that in consideration of 50 per cent. of the commissions received by the plaintiffs in respect of business introduced to them by the defendants, the latter would be liable for 50 per cent. of "any loss sustained" by the plaintiffs on such business. X., who had been introduced by the defendants, became indebted to the plaintiffs in respect of such business. When X. executed an assignment for the benefit of creditors, the plaintiffs thereupon claimed that a "loss" had been sustained within the meaning of the above letter at the time when the assignment was executed:—

Held, that the agreement was one of indemnity and not in the nature of a del credere agency, and that in the absence of evidence of actual loss sustained after taking into consideration the value of the plaintiffs' rights under the assignment, there must be judgment for the defendants.

Willison v. *Ferguson* (1901) 9 Sc. L. T. 169 not followed.

ACTION tried before Horridge J. without a jury.

The plaintiffs, Montagu Stanley & Co., were stockbrokers and members of the Stock Exchange, and the defendants, J. C. Solomon, Ld., were also stockbrokers, but were not members of the Stock Exchange. By a letter dated April 7, 1930, from the defendants to the plaintiffs, the defendants agreed: "In consideration of your paying to J. C. Solomon, Ltd. [the defendants] 50 per cent. of any commission received on business introduced by them as agents, it is hereby agreed that the company [the defendants] shall be liable to you for 50 per cent. of any loss sustained by you in connection with such business." In pursuance of this agreement the defendants introduced one X. to the plaintiffs, and as a result of their transactions with him the latter incurred a loss of 5544*l.*, no part of which was paid. On July 30, 1931, X. executed an assignment of his property for the benefit of certain of his creditors. The plaintiffs thereupon, on the execution of the assignment, claimed 2772*l.*, being 50 per cent. of the above loss as being "loss sustained" within the meaning of the letter of April 7, 1930. They claimed that this was a contract

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MONTAGU STANLEY & CO. *v.* J. C. SOLOMON, LD.

in the nature of a del credere agency. The defendants, while admitting liability to pay 50 per cent. of the loss, contended the contract was one of indemnity, and that the amount of the "loss sustained" would not be ascertained until it was known what (if anything) would be received by the plaintiffs under the assignment.

Hilbery K.C. and *W. N. Stable* for the plaintiffs. The "loss" was incurred on the commission of the act of bankruptcy constituted by the assignment, which is a declaration of insolvency. This case is on all fours with the Scotch case of *Willison* v. *Ferguson.* (1) There the plaintiff was owed money by a company which could not pay. The company therefore accepted a bill for the amount drawn on it by the plaintiff. The defendant, a director of the company, gave the plaintiff a letter guaranteeing him against loss in his accounts against the company. The bill was not met and the company went into liquidation; whereupon the plaintiff sued the defendant on his guarantee for the amount of the bill, claiming that he had sustained the loss on the company going into liquidation. The Court sustained this plea, holding that the loss was sustained when the bill, in spite of pressure, was not paid when it became due. The agreement in the present case is very like a del credere broker's agreement. The "loss" is ascertained—namely, the amount that X. was unable to pay when it became due, and the plaintiff is not bound to wait until the end of the insolvency.

[HORRIDGE J. The plaintiff has to show what his loss in fact is. He might have given evidence of the estimated value of the proceeds from the assignment.]

Kennedy L.J. in *Thomas Gabriel & Sons* v. *Churchill & Sim* (2) said: "I cannot help thinking that it would generally be correct to say that the del credere undertaking or guarantee relates to the solvency of the contracting party, but I am not going, any more than Pickford J. did, so to tie it down, because I can conceive of a case in which it would be impossible to say that the buyer, though he may be temporarily

(1) (1901) 9 Sc. L. T. 169.

(2) [1914] 3 K. B. 1272, 1279.

embarrassed, was not able to pay, and if in fact he did not pay a liquidated sum on the particular day, I think it could quite conceivably be right to say that recourse to the agent is within the intention and meaning of a del credere agency." These dicta are clearly in the plaintiffs' favour. The letter of April 7, though not in terms a guarantee, effects the same purpose as a guarantee.

Pritt K.C. and *H. C. Marks* for the defendants. It is admitted that if one guarantees in writing the payment of a debt, then, if the principal debtor does not pay on the due date, the guarantor, irrespective of the debtor's bankruptcy or anything else, has to pay. But the letter of April 7 was not a guarantee, but an indemnity—an agreement to pay "any loss sustained." If this is an indemnity then anything which reduces the loss and consequently the amount which the indemnifier has to pay must be taken into account: per Lord Blackburn in *Burnand* v. *Rodocanachi.* (1) Here the plaintiffs have rights under the deed of assignment. The question is what loss have they in fact sustained, and they must give evidence of the estimated value (if any) of their rights under the deed. This exact contract is dealt with in *Sutton & Co.* v. *Grey* (2), and it was there held that it was not a guarantee and therefore need not be in writing under the Statute of Frauds. In *Willison* v. *Ferguson* (3), a case of a guarantee, the Scots Court was applying its own peculiar law of guarantee. This is not a del credere agreement, the essence of which is that the agent makes the contract: see Bowstead on Agency, 8th ed., p. 5. Kennedy L.J.'s dicta in *Thomas Gabriel & Sons* v. *Churchill & Sim* (4) may be applicable to the case of a del credere agency, but not to the present case. The nearest branches of the law in which this point could occur are those of fidelity guarantee and marine insurance, but no decisions thereunder are in point.

[*Moore* v. *Evans* (5) was also referred to.]

Stable replied.

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(1) (1882) 7 App. Cas. 333, 339.

(2) [1894] 1 Q. B. 285.

(3) 9 Sc. L. T. 169.

(4) [1914] 3 K. B. 1279.

(5) [1918] A. C. 185.

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Montagu Stanley & Co. v. J. C. Solomon, Ld.

Horridge J. The facts in this case are that the plaintiffs are stockbrokers, and the defendants also are stockbrokers who are not members of the Stock Exchange. On April 7, 1930, the defendants wrote the following letter :—

"Messrs. Montagu Stanley & Co.,
1 and 2 Great Winchester Street,
E. C. 2.

Dear Sirs,

In consideration of your paying to J. C. Solomon, Limited, 50 per cent. of any commission received on business introduced by them as agents, it is hereby agreed that the company shall be liable to you for 50 per cent. of any loss sustained by you in connection with such business.

(Signed) J. Barnes,
Secretary.
J. C. Solomon,
Director."

In my view that is a contract of indemnity, not a contract in the nature of a del credere agreement. What happened was this. The defendants introduced business to the plaintiffs in connection with a gentleman whose name has not been mentioned, whom we have agreed to call X., and from him a sum of 5544*l.* 8*s.* 5*d.* is owing to the plaintiffs. On July 30, 1931, X. executed a deed of assignment for the benefit of some of his creditors, and it has not yet been ascertained what amount will be recovered from his estate to reduce his indebtedness to the plaintiffs. On the one hand the plaintiffs contend that this debt is now a loss within the meaning of the letter of April 7, 1930; on the other hand the defendants say that it cannot be stated what (if any) the loss is until it has been ascertained what will be recovered under the deed of assignment. No evidence was given before me as to whether or not anything will come from that source. If any satisfactory evidence had been given what (if anything) was forthcoming under the deed I should have been in a position to say whether or not a loss had been ascertained. But no such evidence was forthcoming. The question I have to decide is whether or not in the circumstances that have happened, this sum of 5544*l.* 8*s.* 5*d.* is brought within the category of "loss" within the meaning of the letter of April 7, 1930.

Mr. Hilbery cited the case of *Willison* v. *Ferguson.* (1) In that case the defendant had guaranteed the plaintiff in writing against loss in his accounts against a certain company up to a certain amount, and I should have thought that that meant that he guaranteed him against the actual loss sustained. The Scots Court, however, the company having gone into liquidation, held that that meant that the creditor was entitled to proceed against the guarantor without ascertaining the amount which might come to him on the liquidation of the company. Lord Stormonth Darling said: "His position [that of the guarantor], in my view, is not better than that of a cautioner under the old law before 1856, who could demand the benefit of discussion." Whether his position was better or worse depended upon the terms of the agreement itself, and, on the view of the agreement which the Court in that case took, he was in a different position to that in which he would have been if sued as a cautioner before 1856. At that time, before suing the guarantor, the plaintiff had to take proceedings against the principal debtor. He had to prove that there was nothing coming from the liquidator company, or, if anything was coming, how much it amounted to before he could say that his loss was ascertained. I must say, as that case is not binding on me, in my view it ought to have been decided differently.

The other case cited by Mr. Hilbery for the plaintiff was *Thomas Gabriel & Sons* v. *Churchill & Sim* (2), a decision of the Court of Appeal. The plaintiffs contended that the defendants, as del credere agents, were liable to be proceeded against in respect of a breach of the contract by their principals, apart from any question of the insolvency of the latter, and all the Court decided was that a del credere agent only guaranteed the solvency of his principal. No doubt

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(1) 9 Sc. L. T. 169.

(2) [1914] 3 K. B. 1272.

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Horridge J.

Kennedy L.J. said in that case (1): "I cannot help thinking that it would generally be correct to say that the del credere undertaking or guarantee relates to the solvency of the contracting party, but I am not going, any more than Pickford J. did, so to tie it down, because I can conceive of a case in which it would be impossible to say that the buyer, though he may be temporarily embarrassed, was not able to pay, and if in fact he did not pay a liquidated sum on the particular day, I think it could quite conceivably be right to say that recourse to the agent is within the intention and meaning of a del credere agency." Kennedy L.J. says he is prepared to keep his mind open as to that. This exact contract has been dealt with in the case of *Sutton & Co.* v. *Grey* (2), and Kay C.J. in his judgment says (3) "the present case, however, is not strictly that of a del credere agent," and I do not think that the dicta of Kennedy L.J. in *Thomas Gabriel & Sons* v. *Churchill & Sim* (1) as to the position of a del credere agent, as to which he expressly says he kept an open mind, should cause me to come to a different conclusion from the one at which I have arrived. In my view the plaintiffs must show that they have sustained actual loss, and as they have put no evidence before me of loss I cannot hold that because of the deed of arrangement they have sustained a loss. There must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Harris, Chetham & Cohen.*
Solicitors for defendants: *Wild, Collins & Crosse.*

(1) [1914] 3 K. B. 1279.
(2) [1894] 1 Q. B. 285.
(3) [1894] 1 Q. B. 291.

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LAZARD BROTHERS AND COMPANY *v.* MIDLAND BANK, LIMITED.

[1930. L. 2508.]

Banker—Russian Bank—Effect of Nationalization of Banking by Decree of Soviet Government—Writ against Bank—Substituted Service of Notice of Writ—Validity—R. S. C., Order IX., *r.* 2; *Order* XI., *r.* 8.

An English firm commenced an action in 1930 against the Moscow Industrial Bank claiming payment of a large sum of money, and, on the strength of an affidavit stating that the Moscow Industrial Bank was domiciled in Russia and that there was no way of effecting personal service on it, obtained leave under Order IX., r. 2, to serve notice of the writ by posting it by registered letter to the bank at Moscow where its head office had been. No appearance having been entered, judgment by default was signed against the Moscow Industrial Bank on November 24, 1930. Some days later a letter was received from the London Embassy of the Soviet Republic, stating that notice of the writ could not be delivered, as the Moscow Industrial Bank went out of existence in 1917. After having obtained judgment by default, the plaintiffs obtained a garnishee order nisi against the Midland Bank attaching money alleged to be due from that bank to the Moscow Industrial Bank, and that order was subsequently made absolute.

On appeal by the Midland Bank:—

Held, (1.) on the evidence of the Russian decrees as to Russian corporations, and of Russian lawyers as to the effect of those decrees, that the Moscow Industrial Bank had ceased to exist as a juristic person in 1930, and therefore that the judgment by default obtained against it by the plaintiffs was a nullity, and consequently that no garnishee proceedings could be founded upon it; and (2.) that in any view the garnishee order nisi ought not to have been made absolute, inasmuch as service of notice of the writ on the Moscow Industrial Bank was irregular in that the procedure applicable to service in a foreign country, as prescribed by Order XI., r. 8, had not been followed.

Russian Commercial and Industrial Bank v. *Comptoir d'Escompte de Mulhouse* [1925] A. C. 112 and *Banque Internationale de Commerce de Petrograd* v. *Goukassow* [1925] A. C. 150 distinguished.

Per Scrutton L.J.: If it comes to the knowledge of the Court that it has entered judgment in default of appearance against a man who was at the time dead, or a company which was at the time dissolved, or non-existent according to the law of its country of origin, the Court is bound, after hearing the parties interested, of its own motion to set the judgment aside.

Decision of Roche J. reversed.

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APPEAL by the Midland Bank and CROSS-APPEAL by Lazard Brothers & Co. from a decision of Roche J.

The facts giving rise to the procedings are stated in detail in the judgments; shortly they were as follows: Lazard Brothers & Co. (hereinafter called "Lazards"), having a claim in debt against the Banque Industrielle de Moscou (hereinafter referred to as the "Moscow Industrial Bank"), in October, 1930, obtained leave from Branson J. in Chambers to issue a writ against the Moscow Industrial Bank, and under Order IX., r. 2, leave to serve notice of the writ by sending the same by registered post to the defendants at Moscow. Leave to do so was obtained on the strength of an affidavit of one of the partners in Lazards, who deposed that "the intended defendants are a company registered in Russia, and so far as I am aware have no address in this country where service of the writ can be effected. The intended defendants are domiciled in Russia and I am advised and believe that there is no way of effecting personal service in Russia, and neither I nor any member of my firm nor my firm's solicitors know of any person who would undertake an attempt to effect such service. . . . . Moreover, I am advised and believe that all [the directors, administrators and managers of the Moscow Industrial Bank] have been deprived of their powers of representing the intended defendants by decrees of the Russian Government." At a later date a clerk swore an affidavit of service, in which he deposed that the Moscow Industrial Bank "is a corporate body according to the law of Russia." Judgment was thereupon signed against the Moscow Industrial Bank in default of appearance, on November 24, 1930. Three days later a letter was received from the London Embassy of the Soviet Republic, stating that the notice of writ could not be delivered to the addressee in view of the fact that the Moscow Industrial Bank went out of existence during the 1917 revolution.

Lazards then obtained a garnishee order nisi against the Midland Bank in respect of moneys said to be owing by the Midland Bank to the Moscow Industrial Bank. The issue raised by that proceeding was tried by Roche J., before whom evidence was given by a number of Russian lawyers as to the legal effect of the decrees made by the Soviet Government on the question whether or not the Russian banks continued in existence as juristic persons after 1917, Lazards contending that they did, and the Midland Bank that they did not. The material portions of the evidence given by the Russian experts are fully set out in the judgment of Scrutton L.J.

Roche J. held that the effect of the material decrees of the Soviet Government was to put the Russian banks into liquidation and not to extinguish them; that while the proper procedure for effecting service on the Moscow Industrial Bank was that prescribed by Order XI., r. 8, the procedure in fact followed had achieved the same result—namely, brought the writ to the notice of the proper authorities; that no demands for repayment had been made to the Midland Bank which that bank could treat as valid, and therefore that the claim was not barred by the Statute of Limitations; and accordingly he made the garnishee absolute in respect of a sum of 335,230*l.* 14*s.* 7*d.*, disallowing the claim for compound interest after 1918.

The Midland Bank appealed, and Lazards cross-appealed on the claim for compound interest. The appeal was heard on November 2, 3, 4, 5, 6, 9, 10, 1931.

Rayner Goddard K.C. and *F. J. Tucker* for the Midland Bank. In view of the evidence given at the trial to the effect that the Moscow Industrial Bank, like the other Russian banks, has not existed since 1921, there was no possible defendant to a suit at the instance of Lazards. In *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1)—which was followed in *Banque Internationale de Commerce de Petrograd* v. *Goukassow* (2)—the House of Lords held that the defendants in that case had not proved that the plaintiff bank had been dissolved, but the evidence in the present case goes far beyond what was given in the *Mulhouse* case. (1) The judgment by default against the Moscow Industrial Bank and the subsequent garnishee proceedings were mere nullities.

(1) [1925] A. C. 112.

(2) [1925] A. C. 150.

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Even assuming, however, that the Moscow Industrial Bank was an existing entity when Lazards commenced the proceedings, there was never any effective service of the writ upon the bank. Lazards purported to effect service under Order IX., r. 2 (1), whereas the appropriate procedure for service in Russia is that laid down in Order XI., r. 8. (2) The latter is a complete code regulating service out of the jurisdiction. Service should have been through the diplomatic

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(1) Order IX., r. 2: "When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the court or a judge that the plaintiff is from any cause unable to effect prompt personal service, the court or judge may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may be just."

(2) Order XI., r. 8: "Where leave is given to serve notice of a writ of summons in any foreign country to which this Rule may by order of the Lord Chancellor from time to time be applied, the following procedure shall be adopted:—

(1.) The notice to be served shall be sealed with the seal of the Supreme Court for use out of the jurisdiction, and shall be transmitted to His Majesty's Principal Secretary of State for Foreign Affairs by the President of the Division, together with a copy thereof translated into the language of the country in which service is to be effected, and with a request for the further transmission of the same to the Government of the country in which leave to serve notice of the writ has been given. . . . ."

"(3.) An official certificate, or declaration upon oath, or otherwise, transmitted through the diplomatic channel by the Government or court of a foreign country to which this Rule applies, to the English court, shall, provided that it certifies or declares the notice of the writ to have been personally served, or to have been duly served upon the defendant in accordance with the law of such foreign country, or words to that effect, be deemed to be sufficient proof of such service, and shall be filed of record as, and be equivalent to, an affidavit of service within the requirements of these Rules in that behalf.

(4.) Where an official certificate or declaration, transmitted to the English court in manner provided in the last preceding section of this Rule, certifies or declares that efforts to serve a notice of writ have been without effect, the court or a judge may, upon the ex parte application of the plaintiff, order that the plaintiff be at liberty to bespeak a request for substituted service of such notice. . . . ."

"(5.) A request for substituted service of a notice of writ under this Rule may be bespoken by the plaintiff at the department where writs of summons are issued, upon filing a praecipe in Form numbered II. in the schedule to these Rules, and the notice of writ and copy of the same, and the order shall be sealed and transmitted to the Foreign Office in manner aforesaid together with a request in Form numbered III. in the schedule. . . . ."

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channel. In this case it was not brought to the attention of the judge that the procedure laid down by Order XI., r. 8, must be followed; if he had been informed that an attempt had been made to serve the writ on the Moscow Industrial Bank under that rule he would have found that the reason why the writ was not in fact served was because the bank was not in existence.

Thirdly, assuming that there was at the material time an existing party that could be sued, and further, that it was properly served, the Statute of Limitations is a complete defence to the claim. The obligation of a banker is to pay on demand, and a demand is a necessary ingredient in the cause of action against the banker for money lent: *Joachimson* v. *Swiss Bank Corporation.* (1) Demands were made in 1920 and 1921, so that more than six years had elapsed before proceedings were commenced.

Stuart Bevan K.C. and *August Cohn* for Lazards. The point that the Russian banks, including the Moscow Industrial Bank, were not existing bodies at the material time, was not really made in the Court below and, consequently, is not now open. There is no allegation that the bank has ceased to exist; it is said merely that the Soviet Government has taken over the banks; the Government is therefore in the position of a liquidator, and, as such, it alone can make a demand. This view is supported by the decisions of the House of Lords in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (2) and *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (3), where the same decrees as are now before the Court were being considered. The Soviet Government has nationalized the banks. One does not nationalize a dead but a live institution. For the shareholders of the banks the State has been substituted, and for the directors the nominees of the Government. In *First Russian Insurance Co.* v. *London and Lancashire Insurance Co.* (4), Romer J. said (5): "The defendants do not now

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(1) [1921] 3 K. B. 110.
(2) [1925] A. C. 112.
(3) [1927] A. C. 95.
(4) [1928] Ch. 922.
(5) [1928] Ch. 933.

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contend that the plaintiffs ceased to function on December 1, 1918, by reason of their having ceased to exist. Such a contention could not be maintained since the decision of the House of Lords in *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.*" (1)

[SCRUTTON L.J. There the Russian company had a branch office in London.]

The test is not, is the company—in this case the bank—carrying on business ? The test is, does it exist ? The whole of the decrees were available in the *Sedgwick, Collins* case (1), and in the case before Romer J. we have thus a recognition of the continued existence of the institutions. No decree can be pointed to which dissolved the banks.

On the point as to service of the writ: we proceeded, as we were entitled to do, under Order IX., r. 2. We were not bound to invoke Order XI., r. 8. Substituted service may be permitted where personal service is impossible: *Porter* v. *Freudenberg*. (2)

[SCRUTTON L.J. In that case it was laid down (3) that the judge in Chambers, before whom the application is made for substituted service out of the jurisdiction or of notice of such a writ, ought to be careful before acceding to the application to satisfy himself that there exists a practical impossibility of actual service.]

The affidavit showed that.

[GREER L.J. Suppose the Soviet Government came forward and said that the debt was due to it from the Midland Bank and was not due to the Moscow Industrial Bank ?]

The making of the garnishee order absolute is conclusive. The Midland Bank gets its discharge by payment under the order.

[SCRUTTON L.J. This money may possibly be bona vacantia: see *In re Higginson & Dean*. (4)]

That question arises only if, contrary to our contention, the Moscow Industrial Bank does not exist.

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(1) [1927] A. C. 95.
(2) [1915] 1 K. B. 857, 888.
(3) [1915] 1 K. B. 889.
(4) [1899] 1 Q. B. 325.

On the cross-appeal we contend that nothing has occurred to release the Midland Bank from the obligation to pay compound interest.

[They referred to *Ex parte Bevan* (1); *Fergusson* v. *Fyffe* (2); *Williamson* v. *Williamson* (3); *Barfield* v. *Loughborough*. (4)]

Rayner Goddard K.C. in reply. On the question of service out of the jurisdiction the Court in *Porter* v. *Freudenberg* (5) said that Order XI., r. 8, is mandatory, except where diplomatic relations have been broken off between this country and the country in which the person to be served is resident. In the present case diplomatic relations existed between this country and Russia at the material date, and therefore the procedure laid down in Order XI., r. 8, should have been followed. As to the garnishee proceedings: the right to make a garnishee order absolute is discretionary, and the Court is entitled, in exercising its discretion, to take into consideration the realities of the situation, these being, that the Russian banks are indebted to the English banks in sums greatly in excess of the amount involved in this case. Further, Lazards having lain by for many years should not be assisted. On the cross-appeal: it is a rule of equity that compound interest will be allowed only while the account continues to be a mercantile account: see *Crosskill* v. *Bower*. (6) Roche J. was therefore right in refusing to allow compound interest after 1918.

1931. Nov. 23. The following judgments were read:—

SCRUTTON L.J. This is an appeal by the Midland Bank against an order of Roche J. making absolute a rule nisi for a garnishee order obtained by Lazard Brothers & Co. against the Midland Bank in respect of a sum of 335,230*l.* 14*s.* 7*d.*, part of a sum of 542,732*l.* 14*s.* 7*d.*, found by him to be owing from the Midland Bank to the Banque Industrielle de Moscou (called hereinafter the "Moscow Industrial Bank" or the "Moscow Bank"). The garnishee

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(1) (1803) 9 Ves. 223.
(2) (1841) 8 Cl. & F. 121.
(3) (1869) L. R. 7 Eq. 542.
(4) (1872) L. R. 8 Ch. 1.
(5) [1915] 1 K. B. 857.
(6) (1863) 32 Beav. 86.

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order nisi was based on a judgment in default of appearance signed on November 24, 1930, by Lazard Brothers against the Moscow Bank in respect of a writ dated October 29, 1930, for the sum of 362,396*l.*

One of the vital points in this case is whether there was, in October or November, 1930, any existing juristic person known as the Banque Industrielle de Moscou or the Russian equivalent of that name, on whom a writ or notice of a writ could be served, or against whom judgment in default of appearance could be given. I am aware that in *Jacques* v. *Harrison* (1) the Court of Appeal has decided that if a person injuriously affected by a judgment by default and not a party to that action desires to set aside the judgment, he must apply either in the defendant's name, if he is entitled to use it, or in his own name, by a summons served both on the plaintiff and the defendant, to have it set aside. But I am aware of no case, and counsel could not refer me to one, when this has been applied to the case of a non-existent person, or defendant, on whom no summons can be served. Indeed, in my opinion, if it comes to the knowledge of the Court that it has entered judgment in default of appearance against a man who was at the time dead, or a company which was at the time dissolved, or non-existent according to the law of its country of origin, the Court is bound, after hearing the parties interested, of its own motion to set the judgment aside. Such a judgment is null and void: see *Simmons* v. *Liberal Opinion* (2) (non-existent company); *Tetlow* v. *Orela* (3) (plaintiff dead at time of writ); also the observations of Lord Parker in *Daimler Co.* v. *Continental Tyre and Rubber Co. (Great Britain)* (4), referred to by Viscount Cave in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (5): "But when the Court in the course of an action becomes aware that the plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed."

(1) (1884) 12 Q. B. D. 165.
(2) [1911] 1 K. B. 966.
(3) [1920] 2 Ch. 24.
(4) [1916] 2 A. C. 307, 337.
(5) [1925] A. C. 112, 130.

Another vital question in the case, and a very important one as to the practice of the Courts, is whether, even if the defendant was not dead or non-existent, the judgment in default against him was obtained by proper service of the writ. Lord Cave said in *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (1): "I do not doubt that, if it were proved that the writ was not duly served and accordingly that the judgment was liable to be set aside at any time, the Court might well, in the exercise of its discretion, refuse to treat the judgment as a sufficient foundation for a garnishee order."

I address myself, in the first instance, therefore, to the question whether the Moscow Industrial Bank was in October and November, 1930, an existing company in Russia, and, if so, whether it was properly served with the writ on which judgment in default has been entered. Since the decision of the House of Lords in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (2), hereinafter named the *Mulhouse* case, and *Banque Internationale de Commerce de Petrograd* v. *Goukassow* (3), hereinafter named the *Goukassow* case, I think considerable misapprehension has existed as to what they decided. In the first case the Russian Commercial and Industrial Bank—not the bank in the present case, but a bank with a branch in England, which at the time of the judgment was being wound up by the English Courts—issued a writ against a French bank on January 23, 1920. The French bank, which had behaved in a way very unsatisfactory from a business point of view, alleged that at the date of the writ the Russian company had been dissolved by Russian law. The vital Russian decrees were said to be dated in December, 1917, and in 1918. The case was heard in the Court of Appeal on dates from June, 1922, onwards. Witnesses, none of whom had practised in Soviet Courts, had been called in 1921 to prove Russian law. The last Russian decree cited in the House of Lords was one of January 19, 1920, but there was put in evidence a series of letters referred to in the judgment of Atkin L.J. (1), from which it appeared that the English branch of the plaintiff company was, after December, 1917, conducting commercial transactions, and was corresponding with some one or some body in Petrograd, which described itself in various ways, using the name of the bank said to be dissolved, as, for example: "Formerly the Russian Commercial and Industrial Bank, Liquidating Committee," "The People's Bank of the Russian Republic, late the Russian Commercial and Industrial Bank." On such evidence as this the House of Lords arrived at a very cautious and guarded conclusion of fact. Lord Cave said (2): "Having carefully considered it"—the evidence of M. Thal, the high-water mark of the defendants' evidence as to the dissolution of the plaintiff company—"I am still far from being convinced that the defendants have proved—as in order to succeed they must prove—that the plaintiff corporation has ceased to exist." Lord Finlay said (3): "The effect of the Soviet legislation is, to my mind, somewhat obscure. . . . . The burthen of proving that the plaintiff bank had ceased to exist is upon the defendants, who assert the demise of the corporation, and, in my opinion, it has not been satisfactorily established." In other words, on the question of fact whether that Russian bank, with a branch in England being wound up in 1920–24 by the English Courts, had ceased to exist in January, 1920, the House of Lords were not satisfied by the evidence before them that the bank had then ceased to exist. In *Goukassow's* case (4) a Russian bank with a branch in Paris was carrying on business there up to 1920 or later. France did not then recognize the Soviet Government. The House of Lords followed the *Mulhouse* case (5) and held that the Russian company was not proved to be then—1920—dead in Paris. I note that Atkin L.J. said (6): "In the case of an artificial person, such as a foreign corporation, our law would look to the law of the country which created the corporation, and finding the corporation dissolved by that law, our Court must also treat the corporation as dissolved." But in those two cases the question of fact before the House of Lords was: Has the defendant proved, at a time when Russia was in the hands of conflicting authorities, and confused procedure was going on, of which very little evidence was available, that a Russian company, with a branch outside Russia which had carried on business after the Russian Revolution with, amongst others, a Russian body treating itself as a representative or successor of the old company, was dissolved in England by the Russian decrees. The House of Lords found on that question of fact that they were not satisfied that the Russian company was dissolved. The question of fact in the present case is quite different. It is not as to the position of a Russian company in 1920, but as to its position in 1930. The present Russian company had no branch in England, or anywhere else outside Russia. No English Court had any jurisdiction to wind it up. There is no evidence that at the time of the Russian decrees it had any shareholders outside Russia, and there is new evidence, both as to what was happening in Russia after 1920, as to fresh legislation in the Russian Civil Code, and as to the attitude of the Russian courts and the Soviet Government to the old banks.

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(1) [1927] A. C. 102.

(2) [1925] A. C. 112.

(3) [1925] A. C. 150.

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(1) [1923] 2 K. B. 630, 666–669.
(2) [1925] A. C. 128.
(3) Ibid. 141.
(4) [1925] A. C. 150.
(5) [1925] A. C. 112.
(6) [1923] 2 K. B. 693.

Three experts in Russian law gave evidence. Dr. Halpern, who left Russia in December, 1918; Dr. Konkevitch, who left Russia in 1917; and Dr. Dobrin, who practised in the Soviet courts up to 1925, acted for Soviet institutions in England till 1930, and revisited Russia in 1929. Dr. Dobrin strikes me as having more practical acquaintance with the Soviet legal system than any witness yet called. It is unusual, in my experience, for these Russian experts to agree; the two gentlemen called by the Midland Bank disagree, in this case, on several material points. But it is a very striking fact that all three witnesses agree that in 1930, and since, I think, 1924, no Soviet court would recognize that the Moscow Industrial Bank existed as a juristic person

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in Russia. I read their evidence. Dr. Dobrin, referring to a circular of August 3, 1921, not, I think, referred to in the House of Lords cases of *Mulhouse* (1) and *Goukassow* (2): "Taking the facts together I have to say that after the process of nationalization was carried out in relation to any particular bank, then there is an end of the bank." Then Roche J. said: "Up to this stage the private banks had"—and then the note is—"ceased to exist in Russia?" (A.) "Yes." I am not certain whether the question should not be: "not ceased." (Mr. Rayner Goddard): (Q.) "And after the date of that circular, when nationalization was complete, in your opinion would the courts of Soviet Russia have acknowledged the existence of those banks?" (A.) "No." Then on the next page: (Q.) "But you would not agree that the banks existed after the nationalization was completed?" (A.) "No." Then again: (Q.) "In Russia would they admit the existence of any of the private banks?" (A.) "I do not think so." (Q.) "Since when has that been the case? When was the latest date, in your view, that Russia would have admitted the existence of the private banks?" (A.) "Perhaps I am myself a good example of this. Until 1925 when I came to this country the question never occurred to me whether the banks existed." (Q.) "You mean that it did not occur to you that they could exist; is that what you mean?" (A.) "There was no occasion after the actual liquidation in 1921 when all traces disappeared of the existence of the bank in Russia. What could remain of the bank after that?" (Q.) "Then all traces disappeared in 1921, and you say that you could not conceive when you came to England that there could be any existing banks?" (A.) "Yes"; and again: (Q.) "If a letter or a legal proceeding is sent nowadays to Russia addressed to the Moscow Industrial Bank, would that bank be regarded for any purpose as having any existence in Russia to-day?" (A.) "No." (Q.) "As far as you know, would anybody pay attention to it?" (A.) "Only the Post Office authorities would pay

(1) [1925] A. C. 112.
(2) [1925] A. C. 150.

attention to it, and wonder what to do with it." (Q.) "Mr. Stuart Bevan has asked you many questions about the decrees of December, 1917. I think you know from your study of the Russian bank cases that certainly in the House of Lords the Lord Chancellor expressed the opinion that it was a mere declaration of policy. Do you remember that ?" (A.) "Yes, I remember." (Q.) "The decree of 1917 was a declaration of policy, and was not legislative. I want to know how far, if at all, you agree with that ?" (A.) "If I may say so, I cannot agree with that, and everybody in Russia felt in his own skin that it was not a declaration of policy." Dr. Dobrin also said, reading a circular: "you will observe: 'of the late private commercial credit banks with the State Bank' ?" (A.) "Yes." (Q.) "They are treated as being non-existent ?" (A.) "Yes." (Q.) "Late, or defunct ?" (A.) "Yes. Whatever happened before, they were always buried, sometimes they were still alive. That was the policy," meaning, as I understand, that though not completely liquidated the old banks were then extinguished.

Dr. Konkevitch, the witness of Messrs. Lazard Brothers themselves, said: (Q.) "Would a Russian Court, in your opinion, recognize that the banking companies had an existence for juridical purposes ?" (A.) "In my opinion, the Russian Courts would not. A Russian Soviet Court would not recognize that they had, but again I must make a qualification—why ?—because if a Russian Soviet Court interpreted the decree just as we do here it might come to the conclusion to which the House of Lords came in the *Mulhouse* case (1), but there are two laws in Soviet Russia which would alter the situation, both those laws dealing with the interpretation of the laws. The one is the law of October, 1918, and this law states first that Courts are forbidden to decide cases on the ground of the laws of the former overthrown Governments; that means the Tsarist and Kerensky Governments; secondly, which is more important, that in the interpretation of the laws the Courts are to be guided by the

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(1) [1925] A. C. 112.

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Socialist understanding of the law, and there is another law to the same effect." Then again: (Q.) "Did the banks continue to exist in Russia?" (A.) "In what sense?" (Q.) "In the sense as a legal entity?" (A.) "I think I answered that question, that in Russia a court would not sustain an action by a bank. Did not I make that clear? If not, I shall be very glad to make myself more clear than I was." (Q.) "You mean, in other words, the banks in Russia would not be held to have a legal existence?" (A.) "Yes, that is my view." Then again: (Q.) "Would you hold the view as a Soviet lawyer that the bank has been nationalized and has been non-existent both de jure and de facto since 1917?" (A.) "In Russia?" (Q.) "Yes, that is what I am asking." (A.) "That is the interpretation of the Russian decrees as adopted by the Russian courts." Roche J.: "He agrees with that letter as representing what the Soviet courts would decide. That is what you are saying, is it not?" (A.) "Yes, I think the court would decide in that way." Then again: (Q.) "Shall I take it in this way, that if the Russian law has not effected a transfer of property outside the jurisdiction, it still belongs to the company?" (A.) "The company does not exist according to Russian law. I speak as a Russian lawyer."

It is not only that the courts would not recognize the company as existing; the recognized Government of the country states to our Government that the company did not exist. In this case, as stated hereafter, the procedure under Order XI., r. 8, for service of notice of a writ, was not used. But it was used against the same Russian company, in a case, the documents of which were shown to the Court by Mr. Hinton, the Official Process Server of the Supreme Court, in the year 1931, Case 25: *Khutareff* v. *Midland Bank and Moscow Industrial Bank.* (1) In that case our Foreign Office sent forward the notice of the writ to the Russian Foreign Office, who replied on May 22, 1931: "As the institution in question does not at present exist in Moscow, service of the writ is impossible." The Russian Embassy in London had, in the present case, made a similar statement three days after the judgment by default, that the notice of writ could not be delivered by post to the addressee, in view of the fact "that the Banque Industrielle de Moscou went out of existence during the course of the 1917 October Revolution." If the Moscow Industrial Bank tried to appear before a Russian court it could only do so as constituted by a Tsarist decree or charter. The Russian Civil Code of October 31, 1922, which came into force in October, 1923, and which was not before the House of Lords in the *Mulhouse* (1) and *Goukassow* (2) cases, contains the following provisions: "Civil Code of the Russian Socialist Federal Soviet Republic. Introductory Law. Resolution of the All-Russian Central Executive Committee regarding the carrying into effect of the Civil Code of R. S. F. S. R., adopted at the 4th Session of the IX. Assembly on October 21, 1922." Then para. 1: "Civil Code is carried into effect from January 1, 1923." Then para. 6 is: "Interpretation of provisions of the Code on the basis of laws of overthrown governments and of practice of pre-Revolutionary courts is forbidden." Then para. 7: "General three-years limitation of actions is applied also to the legal relations which arose prior to the carrying into effect of the Civil Code of R. S. F. S. R." Art. 14 of the Civil Code is: "Juristic persons must have statutes or regulations confirmed and in proper cases registered by the governmental body empowered to do so. Partnerships of a kind determined in law which pursue economic purposes, instead of statutes, may have partnership agreements registered in an established manner. Legal capacity of a juristic person arises from the moment of the confirmation of the statutes (regulations), and in the cases where the registration of a juristic person is required by law, from the moment of such registration." There was no evidence of registration of the Moscow Industrial Bank under this Code. Tsarist Regulation, if any, would clearly not be recognized by virtue of the Code. The House of Lords in the *Mulhouse* (1) and *Goukassow* (2) cases had also not before them the decree of

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(1) Unreported.

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(1) [1925] A. C. 112.

(2) [1925] A. C. 150.

December 6, 1918, as to Soviet courts: "When considering any matters the People's Court applies the decrees of the Workmen's and Peasants' Government, and in case of absence of a relative decree, or non-completeness of same is guided by the Tsarist understanding of right. Note. References in decisions and judgments to the laws of overthrown Governments are forbidden." When the Russian courts and the Russian government do not recognize the existence of a corporation which, if anything, is a Russian corporation, and which has no branch in this country that can be wound up by these courts, and which has never submitted to the jurisdiction of these courts, I read with great sympathy the remarks of that distinguished American judge, Oliver Wendell Holmes J., in the Supreme Court of Massachusetts, in *Remington & Sons* v. *Samana Bay Co.* (1): "Would it not be a most extraordinary spectacle, if, when a de facto government, recognized as a de facto government by the United States, had made a decree dissolving a corporation, and its decree had been accepted as valid by all succeeding governments of the country having exclusive power and jurisdiction over the matter, the courts of another State should undertake to assert that the corporation existed under the laws of that country, in spite of their repudiation and denial?" Why should the English Courts say there is in Russia a purely Russian corporation when the recognized Russian Courts and Government say there is not such a corporation in Russian law?

The fresh evidence in this case threw considerable light both on the construction of the Russian decrees, and on what in fact happened to the Russian bank companies. The first decree is that of December 14, 1917. Lord Cave said in the *Mulhouse* case (2) that it read more like a declaration of policy than a positive enactment which was to take immediate effect. Dr. Dobrin said in the present case: "In my opinion it was not only a declaration of policy; it was much more.

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(1) (1886) 140 Mass. 494, 501. [Holmes J. was afterwards C.J. of Mass., later an Associate Justice of the Supreme Court of the U. S. Resigned 1931.]

(2) [1925] A. C. 124.

I would say it was an order, an authority for the Executive to begin the destruction of the old banks by that rule which was called nationalization." Nationalization he defines thus: "It consisted in taking possession of any branch or of any other organized unit of a bank and transferring assets and liabilities to the State Bank; I should say to the State in the person of the State Bank." The Resolution of the Council of People's Commissaries on September 20, 1918, speaks of the decree of the Executive Committee of December 14, 1917, in these terms: "The Council of People's Commissaries has resolved: (1.) To recognize that by the Decree of December 14, 1917, there is established the principle of monopolization of banking in Russia by means of nationalization (or liquidation) of all the then existing private and public credit institutions." I think it is now clear that the Council of People's Commissaries, whose chairman was Lenin, had the power to legislate and give executive orders, subject to repeal, or stay of their orders by the Central Executive Committee of Soviets. No orders repealing or staying their decisions have been proved. The most pointed answer was that of Dr. Dobrin when he was asked whether he agreed that the decree of 1917 was a declaration of policy, and answered: "If I may say so, I cannot agree with that, and everybody in Russia felt in his own skin that it was not a declaration of policy." The decree purported to amalgamate all existing joint stock banks with the State Bank, a Tsarist institution re-named "The People's Bank," and their business was temporarily to be managed by the State Bank. The witness explains "temporarily" by pointing out that on January 19, 1920, the People's (State) Bank was abolished, as there was no necessity to use it further as an institution of State credit, and the nation no longer required the existence of separate banking institutions, and all the assets and liabilities of the late People's Bank were then transferred to the Central Budget and Accounts Administration, a department of the Government. The decree of January 26, 1918, confiscated the share capital of the former joint stock bank, and all banks' shares were declared null and void. Lord Cave in

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the *Mulhouse* case (1) expressed the opinion that the next clause of this decree requiring the surrender of "shares" to the State Bank showed that the bank and its "shares" were to continue in existence. Dr. Konkevitch, Messrs. Lazard Brothers' own witness, points out that this is due to a misunderstanding of the double meaning of "shares" in Russia. First, it means a chose in action, the right to participate in the company, and this was declared null and void; but, secondly, it means a bit of paper transferable by indorsement containing particulars of the share, a kind of certificate. The shareholder whose share was declared null and void so surrendered or was in the position of having surrendered his "share" certificate, a document of title, to the State. No share in the company remained in existence, and I have been quite unable to understand how a corporation can exist without corporators. A process of dealing with the old private banks then went on, which resulted on August 3, 1921, in the Budget Accountancy Board issuing a circular stating that the transfers of the assets and liabilities of the old banks, "the late banks," through the People's Bank to the Central Budget Accountancy Department had already been completed in all districts. Dr. Dobrin treats the nationalization, that is, extinction of the old banks, as complete from that date. Dr. Dobrin thinks that some of those may then have been buried alive, that is, when imperfectly liquidated. Dr. Konkevitch is clear that the aim of the Government was to destroy the old banks, but is not quite clear whether they have done it, though oddly enough he thinks they have destroyed the old industrial companies, which is, as is pointed out hereafter, in some cases a matter of some doubt.

I think that it is fairly clear what happened as a matter of fact. In large towns the important banks were seized at once, and their directors left hurriedly, but in the smaller towns it was left to the local Soviets, who acted by collegia. Some Soviets acted at once, others more slowly. In some towns the local branches of several old banks were amalgamated,

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(1) [1925] A. C. 125.

"fused" or liquidated into one local branch of the People's Bank. By January 19, 1920, it was determined to abolish the People's Bank, and by August 3, 1921, the operation of liquidation was said to be completed. Then by the Constitution of 1923, art. 14, any juristic person must have registered statutes, and by the sixth preliminary clause, and the decree of 1918, no reference to Tsarist laws was allowed to the Courts. These Courts would, therefore, not look at the Tsarist constitution of the Moscow Industrial Bank, and there is no evidence, or suggestion, that that bank has been registered under the Soviet constitution. I am satisfied that there is no office of the Moscow Industrial Bank in Moscow—a place where it can be found.

I have very carefully read the evidence before us, and the fresh decrees which were not before the House of Lords in the *Mulhouse* (1) and *Goukassow* (2) cases. Their Lordships were not satisfied that a Russian company which had a branch in England, which was being wound up in 1924, had ceased to exist before that date. On different evidence I am satisfied that another Russian company which had no branch in England, and had never submitted to English jurisdiction, had ceased to exist before October, 1930, in which year the default judgment was given on which the garnishee order in this case was obtained; the judgment against a non-existent company was, therefore, null and void.

This would be sufficient to dispose of the case, but a further question of general importance arises as to the means of service adopted in this case to obtain the default judgment. It was in my opinion so unsatisfactory, that if the company had any shadow of existence, the Court should, using its discretion, decline to make the garnishee order absolute, as it did decline in the case of *Sea Insurance Co.* v. *Rossia Insurance Co. of Petrograd.* (3) The Moscow Industrial Bank, on demand, would owe to Lazards a large sum. It would owe this sum in England, and therefore an order for service out of the jurisdiction of a writ for that sum or notice of a writ

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(1) [1925] A. C. 112.
(2) [1925] A. C. 150.
(3) (1924) 20 Ll. L. Rep. 308.

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could accordingly be made under the English code of procedure. But if the defendant was neither in the jurisdiction, nor had submitted to the jurisdiction by appearance or otherwise, many foreign countries would decline to admit the jurisdiction of the English Courts. Order XI., r. 8, provides: "Where leave is given to serve notice of the writ of summons in any foreign country to which this rule may by order of the Lord Chancellor from time to time be applied, the following procedure shall be adopted." The rule has been applied to Russia by order of the Lord Chancellor, and the procedure under the rule is a procedure actually used. Mr. Hinton supplied us with a list of the cases—sixteen—in which it had been used since 1920. Sometimes service was effected; sometimes the return of the Russian Government was "dead," "left the country," "cannot be found." Under this rule the Russian Government served notice of a writ on the "Russian Volunteer Fleet," an institution which has given some employment to the Courts of this country. During the war this procedure could not be used in the case of enemies, which explains why the full Court of Appeal in *Porter* v. *Freudenberg* (1) found a way of making substituted service under Order IX. on a defendant in Germany. The rules, however, which the full Court laid down for substituted service in that case are of great importance in the present case (2): "The judge in chambers before whom the application is made for substituted service of a writ for service out of the jurisdiction or of a notice of such a writ ought to be careful before acceding to the application—(*a*) To satisfy himself that there exists a practical impossibility of actual service, as otherwise, inasmuch as there is always a certain amount of difficulty and delay in effecting service out of the jurisdiction under Order XI., a plaintiff will always seek to obtain an order for substituted service, with the serious risk that the defendant may never have notice of the proceedings and judgment in default of appearance may be given against him unjustly; (*b*) to satisfy himself for the same reason that the method of substituted service asked for by the plaintiff is one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the defendant." Order XI., r. 8, says that the procedure under it "shall be adopted," and the rule was in operation at the time when this action was started, and was actually used against the Moscow Industrial Bank in that year in another action. It was not used in the present case to obtain the default judgment on which the garnishee proceedings here are founded. Mr. Brand, a partner in the firm of Lazard Brothers, was made, or permitted by his legal advisers, to swear that the Moscow Bank "are"—in October, 1930—a company registered in Russia, and "are" domiciled in Russia, facts which he could not possibly know of his own knowledge; and to continue "and I am advised and believe that there is no way of effecting personal service in Russia, and neither I nor any member of my firm nor my firm's solicitors know of any person who would undertake an attempt to effect such service." This was sworn, though at the time the method of service under Order XI., r. 8, was in effective operation, and His Majesty's Foreign Office was ready to ask the Soviet Government to attempt to effect such service, and the Soviet Government would act on such request. We called on counsel who settled that affidavit to explain his action, and, as I understood his reply, it was that he knew of Order XI., r. 8, but thought, without making inquiry, that it was not being acted upon. In my opinion this was most regrettable behaviour, and the affidavit was a most regrettable affidavit. Persons applying ex parte to the Court must use the utmost good faith, and if they do not, they cannot keep the results of their application. A series of cases to this effect will be found in Kerr on Injunctions, 6th ed., p. 661, note (r). A very recent case is that of *Rex* v. *Kensington Income Tax Commissioners* (1), in which Cozens-Hardy L.J. especially mentions the case of applications ex parte to serve writs out of the jurisdiction as coming within the rule. It is specially important there, for there is

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(1) [1915] 1 K. B. 857.

(2) [1915] 1 K. B. 889.

(1) [1917] 1 K. B. 486, 506.

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a tendency for the judge in Chambers in doubtful cases to think "the defendant can apply to set the writ aside." But if there is no such defendant existing or the writ will never reach him, the mischief is done. I cannot treat an order obtained by such an affidavit as one which the Court should allow to stand. On this affidavit Branson J. made an order: "It is ordered that the intended plaintiffs be at liberty to issue a writ of summons against the intended defendant Banque Industrielle de Moscou. And it is further ordered that the said intended plaintiffs be at liberty to serve notice of the said writ at Moscow by sending the same by registered post to the intended defendants at Moscow in the Republic of Russia and that the time for appearance" be so and so. The "Banque Industrielle de Moscou, Moscou," was an address that would have found the bank in 1917; there was no evidence that in 1930 the bank had any office in Moscow, or that there was any such person. The Russian Government in the same year returned a similar notice of writ to the English Foreign Office with the statement: "No such institution exists at the present time in Moscow." If that statement had been shown to a judge asked to order substituted service by post, I cannot believe that any such order would have been made. The registered letters in which the notice of writ was sent were returned with indorsements "*inconnu*" (not known), "*parti*" (gone away), "does not relate to" (a bank with a somewhat similar name said to have been founded in 1924), "Industrial Bank has been liquidated." A clerk of Messrs. Linklaters & Paines then swore an affidavit of service, alleging the Banque Industrielle de Moscou "is a corporate body according to the law of Russia." This was another reckless affidavit. No one supposes that Mr. John Sanders, who swore the affidavit, has any qualification to express an opinion on the law of Russia in 1930. Judgment in default of appearance was signed on November 24, 1930. Three days afterwards a letter was received from the London Embassy of the Soviet Republic stating that the notice of writ could not be delivered to the addressee in view of the fact that the Banque Industrielle de Moscou went out of existence during the course of the 1917 October revolution.

On this part of the case I do not understand the judgment of Roche J. He agrees that the Court should not make a garnishee order absolute "if it involves assisting the judgment creditor to get execution of a judgment which he certainly or probably ought never to have obtained." At one part of his judgment he seems to think that the fact that the notice of the writ got to a particular bank with a somewhat similar name to the Moscow Industrial Bank, which he thinks was mentioned by the Russian Government in a letter of September 2, 1925, is some ground for thinking that that bank is the liquidating authority of the old Moscow Industrial Bank. But counsel agree that the learned judge was mistaken in thinking that the bank mentioned on the envelope is the bank mentioned in the letter of September 2, 1925. This ground, therefore, goes. But a more serious misconception is involved in the judge's view that if the notice of writ comes to the knowledge of the Government authorities that makes it good service on some one—I am not sure on whom, whether the bank or the Soviet Government. The learned judge cannot really mean that you can serve a notice of writ on a foreign Government out of the jurisdiction so as to found a judgment by default. One would like to say that the Soviet Government was liable for all the debts of the old Russian banks, as they have obtained all their assets. This is the commercial position that the Midland Bank takes up as excusing its attitude. It is a creditor of a large number of old Russian banks; it is a debtor of a large number. On balance it is a creditor of the whole number, if they are now one bank, and it objects to having its debt to one bank picked out of the mass when it cannot recover any credits; it particularly objects when the person attacking it has got a judgment by default by the methods pursued in this case. If I were not satisfied that the Moscow Bank had ceased to exist, I should still be of opinion that the Court, in the exercise of its undoubted discretion, should not make absolute a garnishee order obtained under circumstances like the present.

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I desire to add that, in my opinion, now that it is fairly clear that the Russian Government and the Russian courts will not recognize the old banks as existing in Russia, English judges should be very slow in granting leave to serve notices of writs, or substituted service of writs, on the old banks without very clear evidence that they exist and will be reached by service. The case of old industrial companies may be different, as there is some evidence that a nationalized company may be carrying on business under the old name. Mr. Hinton showed us a case of *Overseas Import Co.* v. *Ivan Kinovaloff* (1), Case 67, in which the Soviet Government made this return in February, 1924: "As the defendant in this case is a nationalized undertaking in accordance with legislation at present existing, and not responsible for debts which arose before nationalization, it is impossible to comply with the request that the writ in question should be delivered," and probably the case of an industrial company will require careful examination of the evidence. Sargant L.J. has described some of the processes that English judges have sanctioned in the Russian bank cases as "solemn farces." I entirely agree. There has been too much laxity in these orders for substituted service. The judges who have made them seem only to have considered whether some one who says he has a claim against an old Russian bank should be enabled to try and get from an English bank a debt which the latter owes to the Russian bank, without remembering that the English bank, with claims of Russian banks against it, has claims against a number of Russian banks, and is put by the confiscatory action of the Soviet Government against all banks in a very unfortunate position, in which it should only be attacked for what can be strictly proved against it.

For these reasons I am of opinion that the judgment of Roche J. cannot stand: (1.) because the judgment in default supporting the garnishee order is against a non-existent person, and therefore void; (2.) because the judgment by default has been obtained by a method of service which cannot be supported. I am, of course, not deciding anything as to the position of the other banks which are attacking the Midland Bank, as I do not know the circumstances or evidence under which their default judgments were obtained. Having arrived at these conclusions, it is unnecessary to consider whether, the default judgment standing, the Midland Bank has a defence by reason of the Statute of Limitations. I am disposed to agree with the view of Roche J. that none of the claims by directors would bind an existing company, and that the power of attorney to Chambers was invalid, but it is not necessary to form or express a final opinion on the matter. The question of the law in force at Rostoff in 1919, in view of the retroactive effect of recognition of the Soviet Government, as discussed in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (1), may also need consideration. Nor is it necessary to consider the cross-appeal of Messrs. Lazard as to compound interest; there is a good deal to be said for the view that it should have stopped when liquidation commenced in 1917.

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(1) (1923) Unreported.

If it were permissible to cross-examine a judge on his judgment, I might be asked: "What is the result of all this on the funds in the hands of English banks which Russian banks, if existent, might claim on demand?" I will only say that it may be necessary to consider the question of bona vacantia. I do not suppose much more will be found about that subject than is contained in the judgment of Wright J. in *In re Higginson & Dean.* (2) He there says (3): "I cannot find that in any case the rights or obligations of a corporation were held to be affected by a technical dissolution. Nor, on the other hand, can I find a case in which such a question has been decided, where the corporation had not been revived, or some provision made by statute or charter with reference to its obligations." The Crown in taking treasure trove makes a liberal equitable allowance to the finder. It may be that a similar equitable adjustment amongst the creditors of Russian banks would do substantial justice.

The judgment by default on which the garnishee order nisi was founded must be set aside, and the order of Roche J.

(1) [1921] 3 K. B. 532.

(2) [1899] 1 Q. B. 325.

(3) [1899] 1 Q. B. 331.

making the garnishee order absolute also set aside. Messrs. Lazard must return the amount they have received, and pay the costs, here and below.

Greer L.J. On October 29, 1930, Messrs. Lazard Brothers & Co. (hereinafter called "Lazards") issued a writ purporting to be a writ against a foreign corporation trading under the name of the Banque Industrielle de Moscou indorsed with a claim for the sum of 362,396*l.* 15*s.* on the strength of an affidavit by the Hon. Robert Henry Brand, a member of Lazards. On October 29, 1930, an order was made by Branson J. in Chambers, giving leave to issue the writ against the intended defendants, the Moscow Bank, and ordering that the plaintiffs should be at liberty to serve notice of the said writ at Moscow by sending the same by registered post to the intended defendants at Moscow in the Republic of Russia. The deponent by the said affidavit, after verifying the amount of the claim, deposed in para. 6 as follows: "The intended defendants are a company registered in Russia and so far as I am aware have no address in this country where service of the writ can be effected. The intended defendants are domiciled in Russia and I am advised and believe that there is no way of effecting personal service in Russia, and neither I nor any member of my firm nor my firm's solicitors know of any person who would undertake an attempt to effect such service." In para. 7 the deponent stated: "In September, 1917, my firm received from the intended defendants a list of all persons including directors, administrators, managers, entitled to sign for the intended defendants. The said list with covering letter and translation of the latter is now produced to me marked 'R. H. B. 4.' Neither I nor any other member of my firm have any knowledge of the whereabouts of any of the said persons whose names appear on the said list. Moreover I am advised and believe that all of them have been deprived of their powers of representing the intended defendants by decrees of the Russian Government." It does not seem surprising that if para. 7 of the affidavit accurately represents the facts the defendants did not appear, and on the usual affidavit of service judgment by default was obtained for the sum of 364,471*l.* 17*s.* 2*d.* Thereupon Lazards proceeded by way of garnishee proceedings to try to obtain the fruits of their judgment by means of a garnishee order for the payment of the amount of their judgment out of a sum of over 500,000*l.* which they alleged was due by the Midland Bank to the Moscow Bank.

The questions involved in the garnishee proceedings came for decision before Roche J., who, after hearing witnesses and counsel on behalf of the Midland Bank and Lazards, made an order adjudging that the sum of 542,732*l.* 14*s.* 7*d.* was due by the Midland Bank to the Moscow Bank, and that out of the said sum the Midland Bank should pay to Lazards the sum of 335,230*l.* 14*s.* 7*d.* in part satisfaction of their debt of 364,490*l.* 0*s.* 6*d.* The Midland Bank appeal to this Court to set aside the said order, and there is a cross-appeal by Lazards to ask the Court to vary the order by substituting for the sum of 542,732*l.* 14*s.* 7*d.* adjudged to be due by the Midland Bank to the Moscow Bank the larger sum of 551,042*l.* 16*s.* 4*d.*

The appeal of the Midland Bank was based on two distinct contentions: (1.) It was alleged that at the time of and before the issue of the writ in the action against the Moscow Bank, the Moscow Bank had ceased to exist as a juristic person, and that the judgment was therefore a nullity and no garnishee proceedings could be founded upon it. (2.) It was contended that a garnishee order absolute is a discretionary order, and even on the assumption that the Moscow Bank must be taken to be an existing corporation the judge ought not to have exercised his discretion by making the order absolute, for the following reasons: (1.) that the service of the notice of the writ was improper, because (*a*) it was made without jurisdiction, or (*b*) if not made without jurisdiction it was made without due regard to the fact that it was quite clear that notice of a writ served, as the notice in question was served, could never come to the notice of any person who could be said to represent the legal entity which was alleged still to exist under the name of the Moscow Industrial Bank, or of any person entitled to represent that company and defend an action, and (*c*) because the alleged debt of the Moscow Bank to Lazards was barred by the Statute of Limitations, and the debt of the Midland Bank to the Moscow Bank was also barred by the Statute of Limitations.

Dealing with these questions in the order in which I have stated them, I consider, first of all, whether upon the evidence given in this case before Roche J. it was sufficiently proved that the Moscow Bank had ceased to exist. Witnesses were called who were experts in the law of Russia, not merely as it was before the revolution, but also as it is under the Soviet regime. The witnesses produced, and referred to, agreed translations of the decrees of legislative and administrative authorities of the Soviet Republic, and they expressed their views as to the effect of the legislation and what had been done under it on the question whether the Moscow Bank was still existing as a legal entity when these proceedings began.

I have considered the agreed translations of the various legislative and administrative documents, and the evidence of the witnesses in this case, and have come to the conclusion that the reasonable inference to be drawn from the evidence of the witnesses and the wording of the legislative and administrative documents is that long before these proceedings began the Moscow Bank had ceased to exist as a legal entity. The question whether the existence of the Moscow Bank as a juristic person, that is to say, as a corporation independently of its place as an indistinguishable part of the Soviet State, is admittedly a question to be determined by the law of Soviet Russia, the Soviet Government having been recognized both de facto and de jure long before the issue of the writ in the action against the Moscow Bank. If I were asked to form an opinion based on the documents alone, I should myself come to the same conclusion as that which appears in the evidence of Dr. Dobrin, who was called on behalf of the Midland Bank, that though there may be some doubt whether the bank ceased to exist on December 17, 1917, by reason of the decree of that date, when that decree was finally carried out, in accordance with the subsequent legislation and administrative action, the bank ceased to exist as a legal entity under the laws prevailing in the country ruled by the Soviet Government. I think, as did the members of the House of Lords who took part in the decision of the cases of *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1)—hereinafter referred to as the *Mulhouse* case—and *Banque Internationale de Commerce de Petrograd* v. *Goukassow* (2)—hereinafter referred to as the *Goukassow* case—that the decree of December 17, 1917, is one which did not have the immediate effect of putting an end to the private banks. It was a legislative statement of the intention of the legislative authority to amalgamate the banks with the State Bank by methods to be afterwards declared. I read clauses 2 and 4 as containing a declaration that the existing joint stock banks and banking houses are to be amalgamated with the State Bank by a method of amalgamation which is to be thereafter determined by special decree. There were a great many private banks in Russia, and no doubt each of them had many branches. The process of liquidating or taking over these banks with their many branches was one which was likely to take a long time, and it is clear from the documents proved in this case, which include those dealt with in the *Mulhouse* case (1), that while the process of liquidation was going on, for the purpose of assisting the process the banks were regarded as continuing to have some existence, notwithstanding the fact that their shares were declared null and void, and their capital and business transferred to the State Bank. The decree of February 27, 1918, clearly shows that the banks were regarded as not yet amalgamated with the State Bank. The decree states that the following matters shall be in the competence of the council of the bank—that is, the State Bank: "14. The definition of the mode of the amalgamation of the late private commercial credit banks with the State Bank." The circular of the Chief Commissar of the People's Bank, No. 32, shows that in his view the administration of the former banks had been abolished and their functions handed over to the People's Bank of the

(1) [1925] A. C. 112.

(2) [1925] A. C. 150.

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Russian Republic, but it seems to imply that though their administration had been abolished and their functions transferred, they still continued to exist. By the decree of July 10, 1918, which was in the nature of a constitutional document, it was provided that the passing of all banks into the ownership of the Workmen-Peasants' State was confirmed. It is extremely difficult for any one who is not acquainted with the way in which these vague statements are construed in Soviet Russia to understand what this means.

On September 20, 1918, a decree was issued by the Council of the People's Commissaries to this effect: "Resolution of the Council of the People's Commissaries, dated September 20, 1918, on the undeviating enforcement of the decree of Monopolization of Banking. Having considered the Report of the People's Commissary of Finance as to the mode of the further carrying into effect of the nationalization of banks, the Council of People's Commissaries has resolved: (1.) To recognize that by the decree of December 14, 1917, there is established the principle of monopolization of banking in Russia by means of nationalization (or liquidation) of all the then existing private and public credit institutions. (2.) To instruct the People's Commissary of Finance to carry out urgently by administrative procedure the nationalization (or liquidation) of all still existing credit institutions. (3.) To direct the People's Commissary of Finance to submit to the Council of People's Commissaries periodical reports as to the course of nationalization of banks and as to the position of banking." This clearly recognizes that there were banks still existing and not at that date completely amalgamated with the State Bank. On December 10, 1918, instructions were given as to the method of nationalizing the private banks, with special reference to the branches. The effect of these instructions is that collegia or syndicates are to be appointed to carry out the liquidation and nationalization of the banks and their various branches. The ordinance of the People's Commissary for Finance of May 7, 1919, shows that even at that date the nationalization and liquidation of the commercial credit banks was still being carried out by a body described as a department; whether a department of the State, or a department of the People's Bank, does not seem easy to determine. The decree of January 19, 1920, abolished the People's State Bank, and transferred its assets and liabilities to the Central Budget and Accounts Administration. On August 3, 1921, the Administration Section of the Central Budget-Accountancy Board to the People's Commissariats for Finance issued a circular with a view to accelerating the operations as to the nationalization and liquidation of the stock and other banks, and ordered official operations as to nationalization to cease.

It was contended that by this date the process of nationalization had been completed and, though it may well be that the legislation up to that date had assumed that the banks were still continuing to exist, when nationalization was completed, as it was at or about the time of this circular, the banks ceased to exist. It is to be observed that in some of these legislative and administrative orders the banks are spoken of as being nationalized, in others as being amalgamated with the State Bank. In speaking of amalgamation or nationalization the documents seem to me to deal with something more than transfer or confiscation of the property of the banks and the taking over of their business. They seem to me to be directed to the absorption of the banking institutions, in the first place in the State Bank, and later in the State itself, that is to say, the banking corporations are to be amalgamated and become one, and that one is to be a national institution. I should, from the documents themselves, conclude that when the process of amalgamation was completed all the private banks had ceased to exist as corporations or juristic persons. Amalgamation and nationalization seem to me to involve that the institutions that are amalgamated or nationalized were absorbed into the only trading institution which the Socialist State recognizes, that is to say, the State itself. I cannot think that after fifty banking corporations are amalgamated into a State Bank or with the State, there are then fifty-one banking corporations, consisting of the old fifty companies and the State Bank, or the old fifty companies and the State.

But it is unnecessary to rest this judgment solely on my own view of the true effect of the legislative and administrative documents given in evidence, because we have the advantage of the opinion of two eminent gentlemen who practised under the Soviet regime, Dr. Dobrin and Dr. Konkevitch. Dr. Dobrin, who was in practice in Russia until 1925, says in his evidence: (A.) "Until 1925 when I came to this country the question never occurred to me whether the banks existed." (Q.) "You mean that it did not occur to you that they could exist; is that what you mean?" (A.) "There was no occasion after the actual liquidation in 1921, when all traces disappeared of the existence of the bank in Russia. What could remain of the bank after that?" Dr. Konkevitch, who was called for Lazards, practised in Soviet Russia in 1918 and 1919. He gives quite definite evidence that no Russian Court would recognize that the banking companies had an existence for juridical purposes, and he points out that by the law of October, 1918, Courts are forbidden to decide cases on the ground of the laws of the former overthrown Governments, and, secondly, that in the interpretation of the laws the Courts are to be guided by the Socialist understanding of the law. Later on he says that he does not agree that a Russian company could not die except by a process of liquidation, and again he says: "The banks in Russia would not be held to have a legal existence." He goes so far as to say that the interpretation of the Russian decrees adopted by the Russian Courts is that the banks had been nationalized, and had been non-existent, both de jure and de facto, since 1917. Having regard to the decision of the House of Lords in the *Mulhouse* case (1), it seems difficult for this Court to adopt the view thus stated by Dr. Konkevitch. For my part, I prefer to follow the evidence of Dr. Dobrin to the effect that when the steps directed for the nationalization of the banks had been finally completed, the banks were then amalgamated with the State, and ceased to exist as separate entities. It is also worthy of note that M. Thal, the only expert in the *Mulhouse*

(1) [1925] A. C. 112.

case (1) who had practised for any substantial time in the Soviet State, said that in his view, after amalgamation in the People's Bank, the private banks had, in the contemplation of the law, no existence. It is also to be noted, from the communications received from the Soviet Government in July, 1924, in relation to the decision in the *Mulhouse* case (1), and in their letter written when the notice of writ was returned in the present case, that in their view under the Soviet laws the banks had ceased to exist as juristic persons some time before July 30, 1924.

So far, I have dealt with this question independently of the provisions of the Code which came into force in Russia on January 1, 1923. Para. 6 of the Introductory Law provides that interpretation of provisions of the Code on the basis of laws of overthrown Governments, and of practice of pre-revolutionary Courts, is forbidden. Art. 13 of the Code provides that juristic persons are recognized associations of persons, institutions, or organizations which can, as such, acquire rights of property, enter into obligations, sue, and be sued in Courts, and by art. 14: "Juristic persons must have statutes or regulations confirmed and in proper cases registered by the governmental body empowered to do so . . . . Legal capacity of a juristic person arises from the moment of the confirmation of the statutes (regulations), and in cases where the registration of a juristic person is required by law, from the moment of such registration." It seems to me that these provisions have the result that the only juristic persons recognized as existing in the jurisdiction of the Soviet Republic are the persons who have statutes or regulations confirmed and, in proper cases, registered by the appropriate department of the Soviet Government. It is not suggested that any of these banks had their regulations so confirmed, or had been registered by such department. It seems to me that whatever view may be taken of the position before January 1, 1923, at any rate, as and from that date, even if they had a juristic personality up to that date, the banks ceased to have any such juristic personality under the laws of Soviet Russia after the Civil Code came into operation. In my view, therefore, if I looked alone to the evidence that was given in this case, I should come to the conclusion that the Moscow Bank had ceased to exist before the writ was issued by Lazards against the bank, and that the garnishee proceedings necessarily fail for this reason.

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(1) [1925] A. C. 112.

But it is contended that it has been decided by the House of Lords in the *Mulhouse* case (1) and in the case of *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (2) that as a matter of law the Moscow Bank and the other banks have not ceased to exist. In my judgment, this argument is not well founded. Questions of foreign law are questions of fact to be determined by the evidence given in each case. In the *Mulhouse* case (1) the writ was issued on January 23, 1920. The only Russian decrees and other documents material to the question of the existence of the Russian banks that were considered and dealt with in the House of Lords were the various decrees and administrative acts up to and including the decree of January 19, 1920: see the speech of Lord Cave. (3) The case must have come for trial some time not later than the early part of 1922, and the effect of the Civil Code was never considered, nor did the Court consider that effect should be given to the final completion of the process of nationalization. In *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (2), which was decided in the House of Lords in July, 1926, the only evidence as to Russian law was contained in the affidavit of M. Krougliakoff, who referred to a number of Soviet decrees in relation to insurance, the latest of which was November 27, 1922. He stated it as his opinion that the Rossia Insurance Company ceased to exist as an independent legal entity as from December 1, 1918. Again, in this case the attention of the Court was not called to the Civil Code, and all that the House of Lords said about insurance companies was that the decrees which were referred to by M. Krougliakoff did not afford any ground for

(1) [1925] A. C. 112.
(2) [1927] A. C. 95.
(3) [1925] A. C. 119.

distinction between the case of insurance companies and the case of banks which had been dealt with in the *Mulhouse* case. (1) In my judgment, neither of these decisions binds this Court to hold as a matter of law that banks continued to exist after the process of nationalization was complete; still less do they bind this Court to hold that, after the Civil Code came into operation, the banks continued to exist as legal entities recognized by the laws of the Soviet Republic. The evidence in this case, documentary and oral, convinces me that when these proceedings commenced the Moscow Bank was not an existing juristic person within the law applicable to the question, that is, the law of Soviet Russia.

If I am right in this, it is unnecessary to deal with the question whether the garnishee order should have been refused by the judge on the ground that the service of the writ was irregular, but inasmuch as this case may be taken for consideration elsewhere it seems desirable to deal with this point also. Lord Cave said in the *Sedgwick, Collins* case (2): "My Lords, I do not doubt that, if it were proved that the writ was not duly served and accordingly that the judgment was liable to be set aside at any time, the Court might well, in the exercise of its discretion, refuse to treat the judgment as a sufficient foundation for a garnishee order." Roche J. exercised his discretion in this case to make the order absolute, on the assumption that the service was valid and regular. In my judgment it was invalid and irregular. The affidavit on which it was obtained stated that the bank was a company registered in Russia. At the time when the affidavit was sworn, and at the time when the order for service was made, the Moscow Bank was not a bank registered in Russia, even if it was an existing juristic person. Order XI. of the Rules of the Supreme Court has often been said to be a code relating to service out of the jurisdiction. I think it relates to all methods of serving writs out of the jurisdiction, whether the service applied for is service of a notice of a writ, or substituted service. Rule 8 admittedly

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(1) [1925] A. C. 112.

(2) [1927] A. C. 102.

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applies to this case, and it seems to me that the only way in which service out of the jurisdiction can be ordered is that leave should be applied for to serve a notice of the writ out of the jurisdiction under r. 8, and then if that fails, and its failure is certified as required by sub-r. 4, an order can be made for substituted service out of the jurisdiction. The proceedings must then take the form prescribed by sub-rr. 4 and 5 of r. 8. It is true that an order can be made under Order IX., r. 2, for service within the jurisdiction of a writ on a foreigner; but I do not think Order IX., r. 2, has any relation to service out of the jurisdiction, whether that service be personal service of notice of a writ or of substituted service by means of any act or proceeding to be done or taken in a foreign jurisdiction. In my judgment the order for service out of the jurisdiction was invalid and a nullity, and no garnishee proceedings could be founded upon it. I think it ought not to have been made.

I think also the judgment obtained upon it ought not to have been acted upon by Roche J. for another reason. In *Porter* v. *Freudenberg* (1) Lord Reading, in giving the judgment of the Court of Appeal, said: "In order that substituted service may be permitted, it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted." In all the cases where claims have been allowed to be made in England by companies whose assets or business have been appropriated by the Soviet Government, the company has been treated as continuing to exist as a separate entity for the purposes of collecting assets existing in this country, and for this purpose the old directors have been deemed to continue to have the authority of the company to act on its behalf. It must have been known to everybody concerned that though the proceedings would probably come to the notice of the Soviet authorities, who did not recognize the existence of the bank, it would be unlikely to come to the

(1) [1915] 1 K. B. 857, 888.

notice of any other person who could represent the bank, and take on their behalf proceedings to set aside the writ. I think that, in these circumstances, if the learned judge had taken this matter into his consideration he ought to have exercised his discretion by refusing to make the garnishee order absolute.

Lastly, it seems to me that to recognize judgments obtained as this judgment was obtained is likely to cause most inconvenient consequences, and may result in grave injustice to banks in this country who have been deprived by Russian legislation of the opportunity of making their Russian debtors pay, if they are liable to be forced by garnishee proceedings to pay, for the benefit of the Soviet Government, debts which they owe to companies the existence of which is not recognized by the Soviet Government. The Midland Bank, if an action were brought against it by the Soviet institution with which all the banks have been amalgamated, would have a complete set-off, and, indeed, a counterclaim, and it does not seem just, under the circumstances, that it should be called upon to pay the debts of one of the dispossessed companies while it is unable by reason of the action of the Soviet Government to recover anything from the companies in the same position which owe it money.

I do not think it is necessary to deal at length with the question of the Statute of Limitations, but I am inclined to think that if it is right to say that the Moscow Bank continued in existence at the time of the demands made by Mr. Chambers, and by two directors, those demands would be demands made on behalf of the bank by agents of necessity, and the Statute of Limitations would run from the date of those demands. Fortunately it is unnecessary to decide this question. I reserve it for further consideration if it should arise for decision in some later case.

In the result, in my judgment, this appeal succeeds, and the garnishee order absolute ought to be set aside, and Lazards should pay the Midland Bank their costs here and below. Having regard to the result of the appeal, the cross-appeal must also fail. If there is no debt from the Midland Bank to the Moscow Bank, it is unnecessary to decide what the amount of that debt would have been if such a debt had been established. The cross-appeal must be dismissed.

SLESSER L.J. This is an appeal from the judgment of Roche J. making an order absolute in garnishee proceedings in favour of Lazard Brothers against the Midland Bank.

Under the provisions of Order XLV., r. 1, the Court or a judge may, upon the ex parte application of any person who has obtained a judgment or order for the recovery or payment of money, upon affidavit by himself or his solicitor stating that judgment has been recovered or the order made and that it is still unsatisfied and that any other person is indebted to such debtor, order that all debts owing or accruing from such other person to such debtor shall be attached to answer the judgment. In accordance with this order the plaintiffs have sought to obtain from the garnishees, the Midland Bank, a sum of money which the plaintiffs say is owing to them from a Russian company, the Moscow Industrial Bank, and, as they have obtained judgment by default against the Moscow Industrial Bank, to recover the amount stated by my Lords under the garnishee proceedings as a sum said to be due from the Midland Bank to the Moscow Industrial Bank. These proceedings required in the first place that judgment should be obtained by Messrs. Lazard against the Moscow Industrial Bank. This preliminary step was sought to be achieved in the following manner: On October 24, 1930, a Mr. Brand, a member of the firm of Lazard Brothers, swore an affidavit. In that affidavit he stated that the defendants were indebted to his firm in the sums already stated by my Lords. He showed a history of transactions between his firm and the Moscow Industrial Bank; he stated that his firm sent to the intended defendants the last quarterly statements of account on September 30, 1917. He further said that his firm, after that date, continued to make and receive payments for account and on behalf of the Moscow Industrial Bank in execution of instructions received from them before the cessation of communications. To this his firm added interest and commission and declared they were entitled to judgment in the sum stated up to October 15, 1930. He said that the sum for which judgment was sought was payable in London, and that the defendants had neglected to pay it or any part of it. To this part of the affidavit no objection is taken, but the rest of the affidavit requires very serious consideration.

The intended defendants, if they existed, were out of the jurisdiction of the Court, and on the hearing of the appeal we were told that it was the intention of the plaintiffs to proceed under Order IX., r. 2, to seek to obtain an order for substituted service, and that it was for this purpose that the affidavit in question was sworn. The intended defendants, according to the affidavit, were a company registered in Russia and, continues Mr. Brand, "so far as I am aware have no address in this country where service of the writ can be effected." He goes on to say: "The intended defendants are domiciled in Russia and I am advised and believe that there is no way of effecting personal service in Russia, and neither I nor any member of my firm nor my firm's solicitors know of any person who would undertake an attempt to effect such service." These sworn statements, for reasons which appear in my judgment, are open to the most grave objections. In the first place, it was conceded at the Bar that the only possible justification for stating that on October 24, 1930, when the affidavit was sworn, the Moscow Industrial Bank was registered in Russia or domiciled in Russia, was that before the revolution in 1917 the Moscow Industrial Bank was so registered and domiciled, and that certain legal decisions in this country had decided not, as I understand, that they were still so registered and domiciled, but that the Moscow Industrial Bank, at the time of the decisions relied upon, still existed. Even if it were true to say that the Moscow Industrial Bank still had a corporate existence, yet I think that the statement of Mr. Brand, which was drafted for him by junior counsel, that the intended defendants *are* a company registered in Russia and *are* domiciled in Russia was entirely unsatisfactory. Such words are only susceptible

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of one meaning, that is, that in Russia, at the time of the swearing of the affidavit, there was a register on which the name of the Moscow Industrial Bank could be found and that they had their domicil in Russia, whereas in truth, at any rate since the coming into force of the Civil Code of the Soviet Republic of January 1, 1923, it is indisputable that the Moscow Industrial Bank was not registered or recognized by any present Russian governmental body. I regret to say that I have come to the conclusion that the affidavit in this material particular is lacking in explicitness. If reliance were placed, as was suggested, on the old corporate capacity derived from laws obtaining under the Tsarist regime which are continued, not by registration under the Soviet rule, but by some operation of law as interpreted in England, it would have been very easy to say so. The affidavit on the face of it makes a statement which is inaccurate, and this falsity cannot be disregarded in considering what subsequently took place.

In my view, moreover, the affidavit is misleading in another aspect when it says that Mr. Brand is advised that there is no way of effecting personal service in Russia. Order XI., which is an order dealing with service out of the jurisdiction, by r. 8 provides that that rule may, by order of the Lord Chancellor, from time to time be applied to foreign countries. The Lord Chancellor's order as regards the late Russian Empire, now the Union of Soviet Republics, was made on March 21, 1906, and was in operation at the time when Mr. Brand's affidavit was sworn. During the proceedings before Roche J., Mr. Hinton, the official process server of the Supreme Court, stated that since the Russian Empire had ceased to exist five or six cases had been dealt with under Order XI., r. 8, in the case of Russia. He cited cases in 1919, 1921, 1923 and 1926, and he said he sent one off, he thought, in April, 1931. Mr. Hinton subsequently produced for inspection in this Court a number of other examples, and there is no doubt at all that, in proper cases, service out of the jurisdiction in Russia can be effected by the notice to be served being transmitted to the Secretary of State for Foreign Affairs, with a request for the further transmission of the notice to the Government of the country in which leave to serve notice of the writ has been obtained, so that it was entirely incorrect to say that there was no way of effecting personal service in Russia. I will deal later with the effect of so disregarding Order XI. For the moment I am only concerned with the unreliability of the affidavit of Mr. Brand of October 24, 1930.

The request for substituted service under Order IX., r. 2, came on in due course before Branson J. in Chambers, when, upon reading this erroneous affidavit of Mr. Brand, it was ordered that the plaintiffs were to be at liberty to serve notice of the writ at Moscow by sending the same by registered post to the intended defendants at Moscow in the Republic of Russia. No other address was given either in the notice of the writ or in the order, and the covering letter from the plaintiffs' solicitors to the Moscow Industrial Bank was addressed to them simpliciter at Moscow, Russia. The notice of the writ was said thus to be served by a Mr. John Sanders on October 29, 1930, in an affidavit by that gentleman in which he states: "I did on October 29, 1930, serve the above-named defendants, Banque Industrielle de Moscou which is a corporate body according to the law of Russia." Again, the statement that the bank is a corporate body according to the law of Russia is unjustified. As I have said, it may be argued that in law the bank still preserves the corporate capacity which it derived from the old Tsarist law, but to say that it is now a corporate body according to the law of Russia is incorrect. It has been suggested that, on November 29, 1930, the law of Russia then existing constituted or recognized the bank as a corporate body. Mr. Sanders, like Mr. Brand, would have been less economical in his statements if he had sworn that, from his view, or, as advised, the Moscow Industrial Bank had retained its late corporate existence which it obtained under the Tsarist law of Russia, which it had never lost. This he failed to do. In all these circumstances, it is not surprising that no appearance was entered for the Moscow Industrial Bank. The envelope in which the writ was contained was eventually returned

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from the returned letter section of the Post Office, London, with Russian writing upon it which we were informed meant that the Industrial Bank had been liquidated, was unknown and had gone away. On November 24, 1930, the plaintiffs obtained judgment by default against the Moscow Industrial Bank.

The plaintiffs, having shot this arrow into the air which came to earth they knew not where, now proceeded on the second stage of their campaign against the Midland Bank. On November 27, 1930, they wrote to the Moscow Industrial Bank at Moscow, Russia, enclosing a copy of the default judgment dated November 24, 1930, which I have mentioned, and also enclosed a copy of a garnishee order nisi. On the same day the Secretary of the Embassy of the Soviet Republic in London returned to the solicitors for Lazard Brothers the notices of the writ and order and covering letters addressed to the Moscow Industrial Bank " which could not be delivered to the addressee in view of the fact that the Moscow Industrial Bank went out of existence during the course of the 1917 October revolution." This letter is acknowledged on November 28, 1930.

On December 10, 1930, the second affidavit of Mr. Brand, for the purpose of obtaining the rule nisi in the garnishee proceedings against the Midland Bank, was sworn. This affidavit states that by decrees of the Russian Government the administration of the Russian banks was abolished and the directors and the managers and all persons entitled to deal with or dispose of the banks' funds were deprived of their powers, but makes no reference to the fact that the writ on which judgment had been obtained had been returned to them by the Russian Government with the accompanying statement that the bank had gone out of existence.

It is, of course, necessary, in order to found garnishee proceedings, that there shall be a judgment upon which proceedings may be based, and it is very clear, when the matter is fairly considered, that there was not in existence here any judgment on which the Court could properly act. A defendant has a right to have a default judgment set aside if it is signed irregularly. In *Anlaby* v. *Prœtorius* (1) Lopes L.J. said: "To obtain that judgment was a wrongful act, not an act done within any of the rules. The defendant is therefore entitled ex debito justitiæ to have it set aside," a view followed in *Hughes* v. *Justin* (2) and in *Muir* v. *Jenks.* (3) So also if a person, who is not a party on the record, seeks to set aside a judgment by which he is injuriously affected, he may be allowed, under proper form and conditions, to intervene: *Jacques* v. *Harrison.* (4) None of these cases is, I think, specifically concerned with a judgment by default obtained on affidavit false in material particulars, but I have little doubt that in an appropriate case under Order XXVII., r. 15—which speaks of any judgment by default being set aside on such terms as the Court may think fit—the Court would regard the falsity of the evidence as a good ground upon which to act, as distinguished from the case of a mere slip or omission which may be corrected, such as appeared in the case of *Armitage* v. *Parsons.* (5)

In the present case there is no specific motion to set aside the judgment, but the importance of this conclusion in this case arises when I consider in what manner the discretion under the garnishee order should be exercised. Once the conclusion is reached that the judgment on which the garnishee proceedings are based is itself one which, in appropriate proceedings, would be set aside, it follows, in my view, that a judge should refuse to make absolute the garnishee order. Roche J. has come to the conclusion that the judgment of Lazard Brothers against the Moscow Industrial Bank was not "in any way improper or improperly obtained," but I see no reason to think that, if the learned judge had come to the contrary conclusion, as I have on this matter, he would not have refused in his discretion, as I think he ought, to make the order absolute against the Midland Bank. As a general principle, when the Court comes to the conclusion that it has been induced to act upon affidavits which are not candid and do not fairly state the facts, but are stated in such a way as to mislead the Court, there is power in the Court to protect itself and prevent an abuse of the process: *Rex* v. *Kensington Income Tax Commissioners.* (1)

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(1) (1888) 20 Q. B. D. 764, 771.
(2) [1894] 1 Q. B. 667.
(3) [1913] 2 K. B. 412.
(4) 12 Q. B. D. 165.
(5) [1908] 2 K. B. 410.

There are, however, two other grounds which go beyond discretion on which this judgment may be attacked. The first is that at the time of the issue of the writ the Moscow Industrial Bank did not exist. Where a company is non-existent, the proceedings against it are entirely abortive: *Simmons* v. *Liberal Opinion.* (2) The case, if this be a correct view, can only be comparable with one of attempted service of a writ upon a dead man—a service which would certainly be a nullity: see *Clay* v. *Oxford* (3); or service on a wrong person: *Walley* v. *M'Connell* (4), in which case the person so wrongly served never became a defendant: see per Erle J. (5)

I turn, therefore, to the problem whether, at the time of the service of the writ, the Moscow Industrial Bank did or did not exist. The evidence of all the legal experts in this case agrees that, at all material times, the Courts in Russia would not recognize the existence of the Moscow Industrial Bank. It is true that in 1924, in the case of *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (6), it was held by the House of Lords upon construction of decrees of the Soviet Republic Government then in operation and before the House—decrees which have been discussed by my Lords in this case—that the defendants had not proved that the plaintiff Russian Bank had been dissolved, and that as late as 1926, in *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (7), it was held, following the *Mulhouse* case (6), that at the date of the writ in that case—namely, May 31, 1923, the insurance company had not ceased to exist, the decrees of the Soviet Government having ordered liquidation, but not having then effected the state of final abolition of the company. But there are present in this appeal two factors which have brought me to the conclusion that this Court should now hold that, whatever may have been the position on the evidence and on the facts at the time those cases were decided, this Moscow Industrial Bank has ceased to exist even in the most abstract form in which existence is legally possible.

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(1) [1917] 1 K. B. 486.
(2) [1911] 1 K. B. 966.
(3) (1866) L. R. 2 Ex. 54.
(4) (1849) 13 Q. B. 903.
(5) Ibid. 911.
(6) [1925] A. C. 112.
(7) [1927] A. C. 95.

The reasons for taking this view are, first, the unanimity of the experts whose evidence has been detailed by Scrutton L.J. in his judgment, that the Russian Courts will not now recognize the existence of the Moscow Industrial Bank. I think that the comparison with that of an outlaw mentioned by counsel is not apt. This corporation admittedly owed its artificial juristic existence to the operation of Russian law, and, if in the country to whose laws it owed its existence the Courts now hold that the law no longer recognizes it, I am unable to see in what astral form it may still be said to continue.

Secondly, in this case we have had before us for our consideration the existing Civil Code of the Russian Soviet Republic, which came into force in October, 1923. This Code was in part considered before Romer J. in *First Russian Insurance Co.* v. *London and Lancashire Insurance Co.* (1) The learned judge, however, according to the report, had only before him the Introductory Law to the Code, which provides that interpretation of provisions of the Code on the basis of laws of overthrown Governments and of practice of pre-revolutionary Courts is forbidden. He said (2) that the experts were by no means agreed ; " Shortly stated, the question upon which they are at issue is whether the law destroys merely the remedy or whether it also destroys the right." This was with regard to a debt. He came to the conclusion that the decrees destroyed only the remedy and not the right. But this was with regard not to the question of the existence of a body by legal operation such as a corporation in which different problems would arise, nor had he before him many other parts of the Civil Code such as

(1) [1928] Ch. 922. (2) [1928] Ch. 950.

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those dealing with juristic persons, which were not material to his decision. In the present case Roche J. has come to the conclusion that the Moscow Industrial Bank is not extinct. He is careful to point out, while he has endeavoured to apply the principles laid down in the earlier decisions, as they have developed since the decisions were given, that he has considered and weighed all the facts for himself and reconsidered the documents. Nevertheless he has come to the view that the effect of the material decrees was to put the banks into liquidation and not to extinguish them. He does not appear to attach that importance which I should attach to the statement of the experts that the bank would not be recognized as having an existence in the Russian Courts, nor does he appear to have had before him many important parts of the Civil Code with which we were favoured.

As to the Civil Code, I note in particular arts. 13 and 14. Art. 13 describes juristic persons as persons who are "recognized associations of persons, institutions or organizations which can, as such, acquire rights of property, enter into obligations, sue and be sued in Courts." I understand the evidence in this case to be that the Moscow Industrial Bank could not sue in Russian Courts, and therefore under art. 13 could hardly be a juristic person. Again, art. 14 provides that: (*a*) "juristic persons must have statutes or regulations confirmed and in proper cases registered by the governmental body empowered to do so." It is common ground that the Moscow Industrial Bank has neither statutes nor regulations confirmed or in appropriate cases so registered by the Soviet law. Art. 18 provides that the existence of a juristic person can be terminated by a proper organ of State power if it deviates from the objects indicated in the statutes or the agreement, or if its organs—general meeting, board of directors—deviate to the side contrary to the interests of the State. It is not suggested here that any such termination has taken place, but the article indicates that the juristic persons contemplated are those constituted by the Soviet State. Lastly, the State Bank in which counsel for Lazard

Brothers argued may be found the umbra of the Moscow Industrial Bank, has been by law abolished and its functions transferred to the appropriate Government Department.

For these reasons I have come to the conclusion that at the date of the issue of the writ in this case, notwithstanding the authorities as to the position at earlier dates, the Moscow Industrial Bank in law had no existence whatever.

This conclusion is also sufficient to decide this appeal in favour of the appellants apart from and beyond any question of discretion, but as this case may go further I proceed to consider yet another ground which was urged before us upon which it was argued that the judgment on which the garnishee proceedings depended could be impeached. This objection is based upon the contention that Lazard Brothers employed the wrong machinery in serving their writ. They elected to proceed under Order IX., which is the Order ordinarily employed for service of a writ of summons, and obtained their order for substituted service under r. 2 of that Order. The contention of the appellants is that in the case of service out of the jurisdiction, where Order XI., r. 8, has been applied by order of the Lord Chancellor, which is the case, as I have already stated, with regard to Russia, Order XI. dealing generally with service out of jurisdiction should alone have been the Order properly to be employed and not Order IX.

"Order XI. is . . . . a complete code on the subject of service out of the jurisdiction": per North J. in *In re Cliff; Edwards* v. *Brown.* (1) Before the Common Law Procedure Act, 1852, there was no mode at law of suing in this country foreigners residing abroad. Where the power is now given it is in a mode pointed out: per Williams J. in *Ingate* v. *Lloyd Austriaco.* (2) In *Heinemann & Co.* v. *Hale & Co.* (3) Fry L.J. said: "According to my view, Order XI. is a code which determines the cases in which there may be service out of the jurisdiction either of a writ of summons or of a notice of a writ of summons. Order IX., with regard to service, was never intended in any case to remove the necessity of obtaining leave to serve a

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(1) [1895] 2 Ch. 21, 23.
(2) (1858) 4 C. B. (N. S.) 704, 709.
(3) [1891] 2 Q. B. 83, 90.

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writ out of the jurisdiction, or to serve notice out of the jurisdiction, and in no way can Order IX. be made available to escape the exercise of the judicial discretion of the Court which is required under Order XI. before a person resident out of the jurisdiction can be affected." "It has been provided by statute that the English Court may under certain conditions, and with certain formalities, allow the issue of writs for service, or of which notice is to be given, out of the jurisdiction. Where those conditions are fulfilled . . . . there may be service abroad": per Lord Esher M.R. in *Wilding* v. *Bean* (1). *Jay* v. *Budd* (2), allowing substituted service under Order IX., r. 2, on a person out of jurisdiction, was an exceptional case, as the defendant was within the jurisdiction when the writ to his knowledge was served.

The respondents in the present case have admitted by their junior counsel that in deciding to proceed under Order IX., r. 2, they were unaware of the existence of the Order of the Lord Chancellor applying Order XI., r. 8, to Russia, and in any event sought to rely upon the well-known war case of *Porter* v. *Freudenberg* (3) in justification of their action. In my view that case does not avail them. Lord Reading, in delivering the judgment of the Court, points out (4) that in a case of a notice in lieu of a writ under Order XI., r. 1, there is no reason why substituted service of that notice should not be permitted in similar circumstances to those in which it is permitted in the case of a writ for service out of the jurisdiction. Both service out of the jurisdiction of a writ or notice of a writ may be allowed under Order XI., r. 1. In the present case, as the defendants were neither a British subject nor in the British Dominions, notice of the writ and not the writ itself had to be served upon them —Order XI., r. 6—and in such a case the machinery for substituted service where required, is expressly provided by Order XI., r. 8, sub-r. 4.

Now, in *Porter* v. *Freudenberg* (3) the order which had been previously made by the Lord Chancellor could not apply to Germany at the time when that case was considered, as

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(1) [1891] 1 Q. B. 100, 102.
(2) [1898] 1 Q. B. 12.
(3) [1915] 1 K. B. 857.
(4) Ibid. 888.

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Germany was at that time at war with this country. Lord Reading pointed out (1) that "before the outbreak of war Germany was, by order of the Lord Chancellor, a country to which this rule"—Order XI., r. 8—"applied, and, so long as that order stood, the procedure to be adopted for service in Germany was regulated by that rule. That order has, however, been revoked by the Lord Chancellor." And the judgment proceeds on the assumption that, unless an order for substituted service in this country of a notice of a writ for service out of the jurisdiction could be made, hardship might be inflicted upon persons, subjects of and residents in this country, who had claims against alien enemies. In my opinion, that case, so far from altering the conclusion that Order XI. constitutes a complete code for service out of jurisdiction, fortifies the practice as indicated by the authorities. The Court further pointed out (2) that "in order that substituted service may be permitted, it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted. The Court may then make such order as may seem just: Order IX., r. 2."

In the present case, had the affidavits truly stated the position, so far from it appearing that the plaintiffs were in fact unable to effect personal service—otherwise than because the company sought to be served did not exist—it would have been shown, by a proper proceeding under Order XI., r. 8, that service of the notice of the writ could have been effected, as indeed it has recently been done in many other cases in Russia, and, consequently, there would have been no justification to fall back on Order IX., r. 2, and, if the official certificate through the diplomatic channel had certified that efforts to serve the notice of the writ had been without effect, then the Court might have ordered the plaintiffs to be at liberty to bespeak a request for substituted service under Order XI., r. 8, sub-r. 4.

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(1) [1915] 1 K. B. 886.

(2) [1915] 1 K. B. 888.

It is thus clear to my mind that the writ was improperly obtained in any event, and the substituted service was a nullity and should have been so found even if the Moscow Bank had existed at the time of the service. In my view, this defect is one which goes to jurisdiction and is alone sufficient to render the garnishee proceedings null. The case of *Ford* v. *Miescke* (1) indicates the strictness with which the Court will require affidavits of notice of writs out of the jurisdiction to comply with the rules. Pollock B. there points out how the rules as to service out of the jurisdiction are precise and there are no means of departing from them. *Lenders* v. *Anderson* (2) reveals the same attitude. The judgment on which the present garnishee proceedings are founded, to quote Bankes L.J. in *Sea Insurance Co.* v. *Rossia Insurance Co. of Petrograd* (3), is not only "a judgment in default of appearance but it is a judgment which can be shown to have been obtained in the absence of any proper service upon the defendants."

These conclusions to which I have come decide this case on all these three grounds stated in favour of the appellants. The Midland Bank, from an abundance of caution, have, however, attempted further to protect themselves by defences based upon the Statute of Limitations. The consideration of those defences occupies a large part of the judgment appealed from. But as, in my view, the appellants are entitled to judgment for the reasons I have given, apart from any reliance upon the statutory defence, I do not feel it necessary to discuss it in any detail, more particularly as I am in substantial agreement with that part of the judgment of Roche J. in which he points out that one argument on all the three suggested claims to the money made upon the Midland Bank from which it is said the statutory time should begin to run is ill-founded—the first two alleged claims, those of 1920 and 1921, because the persons making the claims had at the time of making them no authority as directors to act on behalf of the company, not only because the bank had ceased to exist—a view which Roche J. does not accept—but also because in my judgment the operation of the Soviet decrees and legislation had long before the times of these claims abolished the constitution of the bank and deprived such persons of all authority either as directors or as agents of necessity or negotiorum gestores. As to the third alleged claim of July 30, 1924, said to be made by the Soviet Government, who had nationalized the Moscow Industrial Bank, I do not consider that this claim constitutes a demand for payment, which is a necessary ingredient in the case of banker and customer, as was pointed out in *Joachimson* v. *Swiss Bank Corporation.* (1) All that the Soviet Government did was to give notice that they claimed all sums standing in the books to the credit of the former Russian banking companies, but they did not make any demand for payment, and the answer of the Midland Bank of August 6 does not do more than refuse to admit that they are under any liability to the Soviet Government for such moneys if the Soviet Government had demanded payment, which they did not.

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(1) (1885) 16 Q. B. D. 57.

(2) (1883) 12 Q. B. D. 50.

(3) 20 Ll. L. Rep. 309.

I agree, therefore, that this appeal should be allowed and the cross-appeal—as to compound interest, which could only arise if the appeal succeeded—dismissed, and the judgment set aside as stated by my Lord.

Appeal allowed: cross-appeal dismissed.

Solicitors for appellants: *Coward, Chance & Co.*
Solicitors for respondents: *Linklaters & Paines.*

J. S. H.

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(1) [1921] 3 K. B. 110.

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WESTMINSTER BANK, LIMITED *v.* OSLER (INSPECTOR OF TAXES).

NATIONAL BANK, LIMITED *v.* BAKER (INSPECTOR OF TAXES).

Revenue—Income Tax—Profits—Bank—Conversion of National War Bonds into Conversion Loan and War Loan—Whether such Conversion constituted a Realisation and Reinvestment—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

In the first case the W. Bank during the war acquired as part of its assets certain National War Bonds of various issues. In pursuance of the right given by certain of these bonds, or of a similar right offered by the Government, to convert the bonds into longer term securities, the Bank surrendered them and acquired in exchange certain Conversion Loan and War Loan. The latter securities were greater in value than the bonds surrendered. In assessing the Bank to income tax the profit made on these transactions was included in the assessment. On appeal by the Bank the Crown contended that on the occasion of each conversion the Bank had realised the bonds, and by receiving in exchange investments of greater value had thereby made a profit, and accordingly that such profit should be taken into account in arriving at the Bank's assessments to income tax. The Special Commissioners adopted the Crown's contention. In the second case the N. Bank appealed against similar findings with reference to similar transactions.

Rowlatt J. affirmed the findings of the Commissioners in both cases. On appeal:—

Held, that the transactions in the case of each of the two banks were equivalent to realisations of the old stocks and reinvestments in new securities which had resulted in profits, and the banks were accountable for those profits.

Royal Insurance Co. v. *Stephen* (1928) 14 Tax Cas. 22 approved.

Dicta in *Californian Copper Syndicate* v. *Harris* (1904) 5 Tax Cas. 159; *Commissioner of Taxes* v. *Melbourne Trust, Ld.* [1914] A. C. 1001; and *Brown* v. *National Provident Institution* [1921] 2 A. C. 222 applied.

Decision of Rowlatt J. affirmed.

APPEALS from two decisions of Rowlatt J. on Cases stated under s. 149 of the Income Tax Act, 1918, by the Commissioners for the Special Purposes of the Income Tax Acts.

The appeals, which raised the same question of law, were heard together.

WESTMINSTER BANK, LIMITED v. OSLER (INSPECTOR OF TAXES).

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WESTMINSTER BANK, LD. v. OSLER.
NATIONAL BANK, LD. v. BAKER.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on October 23, 1929, for the purposes of hearing appeals, the Westminster Bank, Ld. (hereinafter called "the Bank"), appealed against assessments to income tax under Sch. D made upon it for the three years ended April 5, 1924, April 5, 1925, and April 5, 1926, respectively. The question at issue was whether the sum of 141,750*l.* hereinafter mentioned should be included in estimating the profits of the Bank liable to assessment under Case I. of Sch. D.

The facts were as follows :—

1. In the course of its business the Bank had occasion to make investments which were varied from time to time. For the purposes of income tax any profit made by the Bank on the realisation of an investment was admitted by the Bank to be part of its profits, and similarly any loss made by the Bank on the realisation of an investment was admitted by the respondent to be a deduction in arriving at the profits of the Bank.

2. During the war the Bank acquired the following National War Bonds :—

(*a*) 4,000,000*l.* 5 per cent. National War Bonds (1st Series, October, 1917). These Bonds were repayable by the Government on October 1, 1922, at a price of 102*l.*

(*b*) 250,000*l.* 5 per cent. National War Bonds (2nd Series, April, 1918). These Bonds were repayable by the Government on April 1, 1923, at a price of 102*l.*

(*c*) 2,205,000*l.* 5 per cent. National War Bonds (2nd Series, April, 1918). These Bonds were repayable by the Government on April 1, 1923, at a price of 102*l.*

(*d*) 1,050,000*l.* 5 per cent. National War Bonds (3rd Series, September, 1918). These Bonds were repayable by the Government on September 1, 1923, at a price of 102*l.*

In the events which happened as hereinafter set out none of the said bonds was repaid by the Government, but they

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were, as it was termed, converted into 3½ per cent. Conversion Loan Stock or into 5 per cent. War Loan, 1929–47. The question in this case was whether in arriving at the profits of the Bank for the purpose of the said assessments there should be included any sum as representing profit resulting from such conversions.

3. The first series bonds were issued on (inter alia) the following terms:—

National War Bonds.

5*l*. per cent. Bonds. Repayable 1st October, 1922, at 102 per cent.

5*l*. per cent. Bonds. Repayable 1st October, 1924, at 103 per cent.

5*l*. per cent. Bonds. Repayable 1st October, 1927, at 105 per cent.

And

4*l*. per cent. Bonds. Repayable 1st October, 1927, at 100 per cent. ("Income Tax Compounded.")

Interest payable half-yearly on 1st April and 1st October.

First Dividend payable 1st April, 1918.

Price of Issue 100*l*. per cent.

Payable on application.

The Governor and Company of the Bank of England are authorized by the Lords Commissioners of His Majesty's Treasury to receive on the 2nd October, 1917, and thereafter until further notice, applications for the above Bonds. Applications may be lodged at any of the Banks hereafter mentioned.

The Principal and Interest of the Bonds are chargeable on the Consolidated Fund of the United Kingdom.

. . . .

Bonds of this issue will be accepted at their nominal value, with due allowance for any unpaid interest thereon, by the Commissioners of Inland Revenue in satisfaction of amounts due on account of Death Duties, Excess Profits Duty or Munitions Exchequer Payments: provided, in the case of Death Duties, that such Bonds have formed part of the

Estate of the deceased continuously up to the date of death from the date of the original subscription or for a period of not less than six months immediately preceding the date of death, and, in the case of Excess Profits Duty or Munitions Exchequer Payments, that they have been held continuously by the firm, company or other person, liable for such Duty or Payment, since the date of the original subscription or for a period of not less than six months before such Duty or Payment becomes due and payable.

Holders of 5*l.* per cent. Bonds of this issue may convert their holdings within fourteen days after any half-yearly interest date (viz.: 1st April and 1st October), and as on such interest date, into 5*l.* per cent. War Loan, 1929–1947, at the rate of 100*l.* 5*l.* per cent. War Loan, 1929–1947, for each 95*l.* nominal value (excluding any redemption premium) of 5*l.* per cent. National War Bonds surrendered; and holders of 4*l.* per cent. Bonds of this issue may convert their holdings at the same times, and in like manner, into 4*l.* per cent. War Loan, 1929–1942 ("Income Tax Compounded") at the rate of 100*l.* 4*l.* per cent. War Loan, 1929–1942, for each 100*l.* nominal value of 4*l.* per cent. National War Bonds surrendered.

The first dividend on a holding of 5*l.* per cent. War Loan, 1929–1947, or of 4*l.* per cent. War Loan, 1929–1942, issued in lieu of National War Bonds converted, will represent interest from the date of conversion to the next succeeding interest date of the Loan into which the Bonds have been converted.

In the event of future issues (other than issues made abroad or issues of Exchequer Bonds, Treasury Bills, or similar short dated Securities) being made by His Majesty's Government for the purpose of carrying on the War, Bonds of this issue will be accepted at par as the equivalent of cash for the purpose of subscriptions to such issues, and an allowance will be made for any interest accrued on Bonds so accepted.

. . . .

4. The terms of the issue of the second and third series Bonds were similar to those of the first series, the only difference in the conversion rights offered being that as regarded the

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third series it was required that any conversion into 5 per cent. War Loan, 1929–47, was to be effected within fourteen days of the half-yearly interest day on War Loan (viz. : June 1 and December 1).

5. (*a*) On April 21, 1922, an offer was brought to the notice of the Bank, of which the following were the material terms :—

Offer of Conversion to Holders of 5*l.* per cent. National War Bonds.

Due 1st October, 1922, and 1st April, 1923.

Holders of the above Bonds may surrender their holdings in whole or in part and receive in exchange therefor :

Either

4*l.* 10*s.* per cent. Treasury Bonds.

Repayable at par on the 15th April, 1932, at the rate of 100*l.* 4*l.* 10*s.* per cent. Treasury Bonds, with a cash payment of 4*l.* (payable on completion of conversion), for each 100*l.* nominal 5*l.* per cent. National War Bonds surrendered

or

3*l.* 10*s.* per cent. Conversion Loan,

at the rate of 134*l.* 3*l.* 10*s.* per cent. Conversion Loan for each 100*l.* nominal 5*l.* per cent. National War Bonds surrendered.

The Governor and Company of the Bank of England are authorized to receive from holders of 5*l.* per cent. National War Bonds due 1st October, 1922, and/or 1st April, 1923, application for the conversion of their holdings as above.

Conversions will be effected as on the 1st April, 1922.

. . . .

3*l.* 10*s.* per cent. Conversion Loan.

Stock issued in exchange for converted holdings of 5*l.* per cent. National War Bonds will rank pari passu and be consolidated with the existing 3*l.* 10*s.* per cent. Conversion Loan.

A full half-year's dividend will be payable on the Stock on the 1st October, 1922.

. . . .

The latest date for the receipt of applications by the Bank of England will be Monday, the 15th May, 1922.

(*b*) In response to the last named offer the Bank on May 6, 1922, surrendered its holdings of 4,000,000*l.* first series Bonds and 2,205,000*l.* second series Bonds in exchange for 8,314,700*l.* (nominal) 3½ per cent. Conversion Loan, the conversion being effected at the stipulated rate of conversion—namely, 134*l.* (nominal) of 3½ per cent. Conversion Loan for 100*l.* (nominal) of National War Bonds.

6. Subsequently in exercise of its rights under the terms of the original issue of the National War Bonds the Bank on October 6, 1922, exchanged its holding of 250,000*l.* second series National War Bonds for 5 per cent. War Loan, 1929–47, at the rate of 100*l.* (nominal) for 95*l.* (nominal) of Bonds.

Similarly, in June, 1922, it had already exchanged its holding 1,050,000*l.* third series Bonds into 5 per cent. War Loan on the same terms.

The Bank thus received 1,368,421*l.* (nominal) 5 per cent. War Loan for 1,300,000*l.* National War Bonds.

7. The Bank in its own books of account carried forward the new stocks at the same price as the National War Bonds appeared in those books at the time of the respective conversions, that is, at the original cost of the National War Bonds to the Bank, either making a new entry at the old price or merely altering the name at the top of the old entry. No profit was thus shown in the Bank's books or accounts as arising from the conversion. It was admitted, however, that the value of the new stocks received in exchange for the Bonds was greater than the original cost of the Bonds to the Bank, and the assessments appealed against were made to include such excess value.

8. For the purposes of computing its profits liable to income tax the Bank did not make any charge for the depreciation of its securities. It was, however, the custom of the Bank to provide in its accounts for its own purposes for depreciation

of its securities, but not to bring into account as a profit any appreciation except upon an actual sale of the security which had appreciated.

9. It was contended on behalf of the Bank that no taxable profit had been realised by the conversion of the National War Bonds into 3½ per cent. Conversion Loan and 5 per cent. War Loan.

10. It was contended on behalf of the inspector of taxes (inter alia) :—

(*a*) that on the occasion of each conversion the Bank had realised the National War Bonds and by receiving in exchange investments of greater value had thereby made a profit.

(*b*) that accordingly such profit should be taken into consideration in arriving at the said assessments.

(*c*) that the assessments had in principle been rightly made.

11. The following cases were referred to : *Royal Insurance Co.*, v. *Stephen* (1) ; *Commissioner of Taxes* v. *Melbourne Trust, Ld.* (2) ; and *Brown* v. *National Provident Institution.* (3)

12. The Commissioners who heard the appeal decided that the conversion of the National War Bonds into 3½ per cent. Conversion Loan must be regarded as the making of a new bargain, and that, following the decision in the *Royal Insurance Co.'s* case (1), income tax was chargeable upon the excess value which had accrued therefrom to the Bank. They also held that while the exercise of an existing right of conversion might be somewhat different, yet they could not distinguish for taxation purposes the conversion of National Bonds into 5 per cent. War Loan from the conversion into 3½ per cent. Conversion Loan.

They adjourned the appeal accordingly for the settlement of the figures of the assessments.

On July 25, 1930, the parties to the appeal appeared before the Commissioners, and stated that it had been agreed that on the basis of the Commissioners' decision the profits or excess value on the conversions amounted to 141,750*l.*, and the Commissioners amended the assessments appealed against accordingly.

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(1) 14 Tax Cas. 22.

(2) [1914] A. C. 1001.

(3) [1921] 2 A. C. 222; [1920] 3 K. B. 35.

NATIONAL BANK, LIMITED v. BAKER (INSPECTOR OF TAXES).

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts on June 25, 1930, for the purpose of hearing appeals, the National Bank, Ld. (hereinafter called "the Bank"), appealed against assessments to income tax under Sch. D made upon it for the five years ended April 5, 1924, April 5, 1925, April 5, 1926, April 5, 1927, and April 5, 1928.

In the course of its business the Bank had occasion to make large investments which were varied from time to time. For the purposes of income tax any profit made by the Bank on the realisation of an investment was admitted by the Bank to be part of its profits, and similarly any loss made by the Bank on the realisation of an investment was admitted by the respondent to be a deduction in arriving at the profits of the Bank.

At various times the Bank acquired certain National War Bonds, the particulars of those which were material to this case being as follows:—

War Bond.	Amount acquired and subsequently converted.
1st Series issued October, 1917 .	30,000*l.*
1st Series issued October, 1917 .	518,502*l.*
2nd Series issued April, 1918 .	2,522,000*l.*
2nd Series issued April, 1918 .	445,000*l.*
3rd Series issued September, 1918 .	44,300*l.*
3rd Series issued September, 1918 .	25,000*l.*
3rd Series issued September, 1918 .	700,000*l.*

In the events which happened as thereinafter set out in the Case stated none of the said Bonds were repaid by the Government or sold by the Bank, but were, as it was termed, "converted" into 5*l.* per cent. War Loan. The sole question in the case on which the opinion of the Court was sought was whether in arriving at the profits of the Bank for the purposes of the said assessments there should be included any sum as representing profit resulting from such conversions.

In exercise of its rights under the terms of the issues of the National War Bonds, the Bank at various times converted the Bonds set out in para. 2 of the Case into 5*l.* per cent. War Loan, 1929–47, at the rate of 100*l.* (nominal) of War Loan for 95*l.* (nominal) of Bonds. The market value of the War Loan so received was admittedly greater in value than the original cost of the Bonds to the Bank, and the assessments appealed against were made to include such excess value.

For the purposes of computing its profits liable to income tax the Bank did not make any charge for the depreciation of its securities.

The contentions of the Bank and the inspector respectively were the same as those set out in the case of the Westminster Bank.

The Commissioners decided that, following the *Royal Insurance Co.'s* case (1), income tax was chargeable upon the excess value which had accrued to the Bank.

Rowlatt J. upheld the decision of the Commissioners in both cases.

The Westminster Bank and the National Bank appealed.

The appeals were heard together on January 15 and 18, 1932.

Latter K.C. and *J. S. Scrimgeour* for the Westminster Bank. The question in this case is whether a taxable profit has been realised by the Bank by the conversion of its National War Bonds into $3\frac{1}{2}$ per cent. Conversion Loan and 5 per cent. War Loan. The trade of the Bank includes dealing in securities, and the question is whether a profit has been actually acquired by it in its trade. If a person merely exchanges one security for another he cannot be said thereby to have made a profit. A profit only arises where a person gets money out of his trade. Until he realises the particular property no profit arises for income tax purposes. The property still remains an asset of his business. There must be an actual sale or realisation resulting in a profit. A debt, as here, is not realised by merely changing its form. The Commissioners have here held, following *Royal Insurance Co.* v. *Stephen* (1), that a taxable profit arose on the conversion. That case was a very different one from the present.

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(1) 14 Tax Cas. 22.

A profit can only be treated as such when it is earned. In *Commissioner of Taxes* v. *Melbourne Trust, Ld.* (2), Lord Dunedin, in delivering judgment of the Privy Council, said: "As regards the question of when a profit is earned their Lordships' view is that a profit can be said to be earned when it is dealt with as a profit. In ordinary cases this synchronizes with the realization of the sums which swell the assets of the person or company, and which entering the account (whether on the creditor or debtor side will depend on the particular account in view) go to bring out the balance which is deemed profit": see also *Whimster & Co.* v. *Inland Revenue Commissioners* (3); *H. J. Green* v. *J. Gliksten & Son.* (4)

Here there has been merely a change from one form of stock in trade to another.

Rowlatt J. in the present case followed his own decision in *Royal Insurance Co.* v. *Stephen* (1), in which he held that the surrender of the old stocks enabled the value of the company's holding of those investments to be ascertained and was equivalent to a realisation. If that case is to be regarded as a decision on a question of fact, it was, it is submitted, wrongly decided.

Here the judge has not directed his mind to the question of whether a profit has been realised. All that has here happened is that there has been an alteration in the form of the Government's debt to the Bank. The question of volition has no bearing one way or the other.

As regards making a new starting point. The Bank here has carried forward in their books the new stock at the same price as the old, and there is therefore no question of a new starting point. The question of fact whether that was a realisation was not found against the Bank by the

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(1) 14 Tax Cas. 22.

(2) [1914] A. C. 1001, 1011.

(3) (1925) 12 Tax Cas. 813, 823, 827.

(4) [1928] 2 K. B. 193, 201; [1929] A. C. 381, 385.

Commissioners. There was no evidence here before the Commissioners on which they could find that there was a profit which had been realised.

Rowlatt J. relied on *Commissioner of Taxes* v. *Melbourne Trust, Ld.* (1), but that case affords no assistance on the question of what constitutes the realisation of a profit. Here the Bank has had one debtor, the Government, from the first, and has merely altered the terms on which the debtor has continued to retain the Bank's money.

In *Brown* v. *National Provident Institution* (2) the question was whether a profit had been made on a discount. The taxation there was under Case III. of Sch. D, and the case is of no assistance in the present case.

You have not made a profit out of your trade until you have changed some asset into another asset outside your stock in trade.

[They also referred to *Scottish Union and National Insurance Co.* v. *Smiles.* (3)]

J. S. Scrimgeour (*Wilfrid Greene K.C.* with him) for the National Bank. The facts in the National Bank case do not differ materially from those in the Westminster Bank case, except that all the War Bonds in the former case were changed into War Loan. It is not disputed that in the case of both Banks there was an accretion to the Banks' assets at the time of the conversion.

In *Gresham Life Assurance Society* v. *Styles* (4) Lord Halsbury said: "Now to my mind it is very clear what is the intuitus, both from the enactment and from the rules under which the duties are to be ascertained. The thing to be taxed is the amount of profits and gains. The word 'profits' I think is to be understood in its natural and proper sense—in a sense which no commercial man would misunderstand. But when once an individual or a company has in that proper sense ascertained what are the profits of his business or trade, the destination of those profits, or the charge which has been made on those profits by previous agreement or otherwise, is perfectly immaterial. The tax is payable upon the profits realized." The question here is whether the accretion had become tangible. In *In re Oxford Benefit Building and Investment Society* (1) it was held that realised profits must be taken in its ordinary commercial sense as meaning at least "profits tangible for the purposes of division." It would be wrong, therefore, in the case of a company, for the company to treat itself as having made a profit by the exchange of one security for another and to pay a dividend out of that profit. Estimated profits are not the same thing as realised profits.

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(1) [1914] A. C. 1001.

(2) [1921] 2 A. C. 222; [1920] 3 K. B. 35.

(3) (1889) 2 Tax Cas. 551.

(4) [1892] A. C. 309, 315.

[He also referred to *Cross* v. *Imperial Continental Gas Association*. (2)]

R. P. Hills (*Sir William Jowitt A.-G.* with him) for the Crown in both appeals. Sect. 10 of the Finance (No. 2) Act, 1931, is a tacit recognition by the Legislature of the correctness of Rowlatt J.'s decisions in *Royal Insurance Co.'s* case (3), and the two present cases.

As to the effect of subsequent legislation on earlier legislation see *Ormond Investment Co.* v. *Betts*. (4)

In *Commissioner of Taxes* v. *Melbourne Trust, Ld.* (5), Lord Dunedin, in delivering the opinion of the Board, said: "Their Lordships think that the principle is correctly stated in the Scottish case quoted, *Californian Copper Syndicate* v. *Harris*. (6) 'It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.'" Those remarks apply in the present cases. Here there has been a dealing with the securities, and the question is, has there been a realisation, and it is submitted that there has been. The market values of the various stocks were easily ascertainable at the date of the conversion of the stocks, and there was no difficulty in their realisation. What the Bank obtained in War Loan was of considerably greater value than the original cost to the Bank of the War Bonds. Profits have, therefore, been realised on these transactions which are assessable to income tax.

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(1) (1886) 35 Ch. D. 502.
(2) [1923] 2 Ch. 553, 564.
(3) 14 Tax Cas. 22.
(4) [1928] A. C. 143.
(5) [1914] A. C. 1001, 1010.
(6) 5 Tax Cas. 159.

[He was stopped.]

LORD HANWORTH M.R. These appeals raise intrinsically difficult questions, and in order to make it plain that I am not unmindful of the arguments that were presented with force in favour of the appeal I say at once that my mind has fluctuated between the two views presented.

The facts can be very shortly stated. The Westminster Bank subscribed during the war for a large number of War Bonds; they subscribed to a series in October, 1917, and took no less than 4,000,000*l.* of 5 per cent. National War Bonds; they were repayable by the Government on October 1, 1922, at a price of 102*l.* They subscribed to a 2nd series in April, 1918, of a quarter of a million 5 per cent. National War Bonds, repayable in April of 1923 at a price of 102*l.* They subscribed in April, 1918, also for 2,205,000*l.* 5 per cent. National War Bonds, repayable on April 1, 1923, at a price of 102*l.*; and they subscribed for or they took 1,050,000*l.* 5 per cent. National War Bonds (3rd series, September, 1918). These Bonds were repayable by the Government on September 1, 1923, at a price of 102*l.* Now these National War Bonds were taken on terms which are set out in the Case. They could be "accepted at their nominal value, with due allowance for any unpaid interest thereon, by the Commissioners of Inland Revenue in satisfaction of amounts due on account of Death Duties, Excess Profits Duty or Munitions Exchequer Payments," and so on. Also the holders of these 5 per cent. Bonds "may convert their holdings within 14 days after any half-yearly interest date (viz., 1st April and 1st October), and as on such interest date, into 5 per cent. War Loan"—that is the big War Loan of 1929–1947—"at the rate of 100*l*. 5 per cent. War Loan, 1929–1947, for each 95*l*. nominal value . . . . of 5*l*. per cent. National War Bonds surrendered; and holders of 4*l*. per cent. Bonds of this issue may convert their holdings" into other tax-free War Loan. Also: "In the event of future issues (other than issues made abroad or issues of Exchequer Bonds, Treasury Bills, or similar short dated Securities), being made by His Majesty's Government for the purpose of carrying on the War, Bonds of this issue will be accepted at par as the equivalent of cash for the purpose of subscriptions to such issues, and an allowance will be made for any interest accrued on Bonds so accepted." There was therefore inherent in the Bonds a right to take advantage of an alternative which was offered in the War Loan or to subscribe to future issues of Exchequer Bonds and other short dated securities. As a matter of fact what happened was that of the four subscriptions to which I have referred, the 250,000*l*. of the 2nd series taken in April, 1918, and the 1,050,000*l*. 5 per cent. National War Bonds taken in September of 1918, were changed into War Loan 1929–1947. There was another Conversion Loan—a 3½ per cent. Conversion Loan—and that was issued in 1922. The offer was made to those persons who were holders of such Bonds as were held by the Westminster Bank that those Bonds could be converted on terms that each nominal 100*l*. of War Bonds surrendered should be converted into 134*l*. of 3½ per cent. Conversion Loan, and the Item 1, that is 4,000,000*l*. of 5 per cent. National War Bonds, and the Item 3, the 2,205,000*l*. 5 per cent. National War Bonds, were converted by the Bank into 3½ per cent. Conversion Loan.

The figures as to the actual amounts received are stated in the Case. The Bank in its own books of account "carried forward the new stocks at the same price as the National War Bonds appeared in those books at the time of the respective conversions, that is at the original cost of the National War Bonds to the Bank, either making a new entry at the old price or merely altering the name at the top of the old entry. No profit was thus shown in the Bank's books or accounts as arising from the conversion. It was admitted, however, that the value of the new stocks received in exchange for the Bonds was greater than the original cost of the Bonds to the Bank and the assessments appealed against were made to include such excess value." We are told what is the practice of the Bank for the purposes of computing its profits liable to income tax: "The Bank does not make any charge for the depreciation of its securities. It is, however, the custom of the Bank to provide in its accounts for its own purposes for depreciation of its securities, but not to bring into account as a profit any appreciation, except upon an actual sale of the security which has appreciated." With regard to the Westminster Bank case, para. 12 of the Case says: "We, the Commissioners who heard the appeal, decided that the conversion of the National War Bonds into 3½ per cent. Conversion Loan must be regarded as the making of a new bargain and that following the decision in the *Royal Insurance Co.'s* case (1) income tax was chargeable upon the excess value which had accrued therefrom to the Bank. We also held that while the exercise of an existing right of conversion might be somewhat different, yet we could not distinguish for taxation purposes the conversion of National Bonds into 5 per cent. War Loan from the conversion into 3½ per cent. Conversion Loan."

Now that is how the matter arises. In reference to the Westminster Bank case Rowlatt J. upheld the decision of the Commissioners, and followed his own decision in *Royal Insurance Co.* v. *Stephen.* (1)

In the case of the National Bank, Ld., the facts are simpler. There there were a number of War Bonds which were taken by the Bank over a succession of the war years, and all those Bonds so taken by them were in exercise of the right given by the Bonds themselves converted into 5 per cent. War Loan. So far as I read the Case there is nothing to differentiate the facts in that case from those which I have stated in reference to the Westminster Bank.

(1) 14 Tax Cas. 22.

Now first of all I have had great doubt as to whether this is one of those cases which fall within the jurisdiction and sphere of the Commissioners to decide as upon a question of fact. Admittedly it is a troublesome question; it is one on which accountants might advise their clients that they ought to treat a profit which had appeared—I use a neutral term—in one way or another. It is just that class of case which business men may be better equipped to decide than a mere lawyer. But the Commissioners, while making a finding of fact, followed the decision in the *Royal Insurance Co.'s* case. (1) They have, therefore, not decided it merely as a question of fact upon their own initiative, but have decided it upon guidance given to them under the law. We, therefore, have to look at it, I think, as a question of law, that question being: Was a right decision come to in the *Royal Insurance Co.'s* case (1), and were the Commissioners therefore right in directing themselves in law when they followed that case? The Royal Insurance Company for the purpose of its general business held large investments, including a variety of British railway stocks. Under the Railways Act, 1921, the company was required to accept new stocks in the amalgamated companies in exchange for the stocks previously held in the companies, which under the Act were either amalgamated or absorbed. The new stocks received had a definite market value on the date of exchange, and this value was less than the original cost to the company of the stocks surrendered. The company claimed that the difference should be allowed as a deduction in computing its profits assessable under Case I. of Sch. D. The Crown contended that the company had not realised any loss and that its claim was in effect a claim to write down the book value of investments still held. The Special Commissioners upheld the Crown's contentions. Rowlatt J. held that the surrender of the old stocks enabled the result of the company's holding of those investments to be definitely ascertained and was equivalent to a realisation.

Mr. Latter, quite rightly, with his great knowledge of these matters, disclaimed the suggestion that any difference was introduced by the fact that the investment was imposed upon the Insurance Company by the statute of 1891 and that their volition in the matter was taken away, but he rightly referred to the fact that that has never been taken as a test or touchstone by which a decision could be reached, for a profit has been held to be a profit and taxable even though it has arisen from the compulsory act of the authorities who took, and so for the purpose bought at a profit, some of the assets of a company. Those are cases which have been decided in connection with the excess profits tax. Now, the reasoning upon which Rowlatt J. held that the Insurance Company were entitled to deduct the loss which they had realised was this (1), that at the time when they took the new stock in the new amalgamated companies there was a new starting point set up "so that there will be a new profit or loss when the substituted stocks are sold by comparison of what they are sold for or realised for with the figure at which the stocks have now been acquired." He refers to the way it was put by Lord Dunedin in the *Melbourne Trust* case. (2) Rowlatt J.'s words are "this transaction is a fair starting point for a new period, in substance, a new period starting with regard to the substituted stocks." Now, we have to see whether or not there was a new starting point, a realisation in the sense that you can put your finger upon a point of time at which it could be said by the Banks that they had acquired an increased sum as against the amount originally paid for the security, and with that increased sum in their hands were able to make a larger investment than they would have been able to make if they had only had the original purchase price of the first investment to deal with. It does appear upon the facts that there was a new starting point, and here I will deal with the difficulty which occurred to my mind.

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(1) 14 Tax Cas. 22.

From the facts which I have stated it is plain that the Westminster Bank in two cases and the National Bank in all took advantage of a right which was given them by the terms of the original bargain. They exchanged their National Bonds into War Loan, and it might be said that they had therefore, merely by a sequence of events, retained the same investment, an investment in respect of which the debtor was the same, an investment in which they had the alternative right to hold it as it was originally placed in their hands or to alter it into a new character—a right which was given under the original terms of the bargain. I am satisfied that that is not the true view. The same point does not arise in respect of the exchange into the 3½ per cent. Conversion Loan, because the 3½ per cent. Conversion Loan was a new issue in 1922; but, going back to the exercise of the existing right of conversion and converting the National Bonds into War Loan, what was the position? The Bank could have held those Bonds until their due date and been paid off at the full value to which they were then entitled, or they could have sold them, or they could, as they did, convert them into 5 per cent. War Loan; but, equally, whichever alternative they adopted, it was an alternative which put an end to the existence of the National Bonds as such in their hands, and they preferred, instead of waiting till the due date, to exchange the Bonds at the time when they did for 5 per cent. War Loan. I therefore think that the Commissioners are right in saying that they cannot distinguish between the two operations which were carried out by the Westminster Bank in respect of their choice of 5 per cent. War Loan and 3½ per cent. Conversion Loan. I go back, therefore, to consider whether Rowlatt J. is right in what he held in *Royal Insurance Co.* v. *Stephen.* (1) I think it is important to see what Lord Dunedin said in *Commissioner of Taxes* v. *Melbourne Trust, Ld.* (2) He there had to consider what was the effect of the operation whereby three companies had taken over the assets of the several Australian Banks that were in difficulties, when those three companies were ultimately taken over by one single company, and he says (3): "Holding, then, that the shareholders of this company are shareholders in an ordinary venture, the only question that remains is whether the surpluses realized represent profits. Their Lordships think that the principle is correctly stated in the Scottish case quoted, *Californian Copper Syndicate* v. *Harris* (1): 'It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to income tax' "—he is there dealing with what I might call the lay investor—" 'But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.' " It will be observed there that once this is a business transaction, whether it is realisation or whether it is conversion, it may then be assessable to income tax in respect of the enhanced values obtained. The *Californian Copper Syndicate* case (1) contains, besides that passage which I have read, the following observations made by Lord Trayner (2): "But it was said that the profit—if it was profit—was not realised profit, and, therefore, not taxable. I think the profit was realised. A profit is realised when the seller gets the price he has bargained for. No doubt here the price took the form of fully paid up shares in another company, but, if there can be no realised profit, except when that is paid in cash, the shares were realisable and could have been turned into cash, if the appellants had been pleased to do so. I cannot think that Income Tax is due or not according to the manner in which the person making the profit pleases to deal with it." And then he gives a cogent illustration to re-enforce that view. In other words the *Californian Copper Syndicate* case (1), which has been approved by the Privy Council, gives an illustration of what is a realised profit, and applies that, not merely to the case where cash is paid, but where something that could be turned into cash is paid for the original investment. It would be a bold action on the part of this Court if we were to neglect those statements, the statement by the Privy Council and the statement made in the Court of Session, and also if we were to say that Rowlatt J., who had advised himself on the basis of those decisions, was wrong.

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(1) 14 Tax Cas. 22, 28.

(2) [1914] A. C. 1001.

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(1) 14 Tax Cas. 22.
(2) [1914] A. C. 1001.
(3) [1914] A. C. 1001, 1010.

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(1) 5 Tax Cas. 159.

(2) 5 Tax Cas. 159, 167.

There is, however, still one authority which I find it impossible to neglect, the authority in *National Provident Institution* v. *Brown*. (1) It is quite true, as Mr. Latter said —and he is entitled to make what he can of it—that the point was not definitely placed in issue in the House of Lords. It was, I think, adverted to both by Rowlatt J. and in the Court of Appeal, although it may not have been absolutely necessary for the ultimate decision of the case; but they were considering the effect of the change of security, and, without going through all the passages to which our attention has been called, Rowlatt J. does say (2): "I treat the so-called conversion of a Treasury Bill into War Loan as being in substance, as it was in form, a sale to or rediscount with the Government at a price representing the original price plus the proportion of interest or discount accrued." When the matter was in the House of Lords Lord Haldane said (3): "I see no answer to the argument as stated by Warrington L.J. It is concise, and I will adopt his words: 'When a holder, whether the original purchaser or not, realizes during currency, he really receives a proportion of the total profit resulting from the fact that the bill was bought at a discount. . . . . Profits made by discounting bills seem to me to rest on the same footing, and conversion into War Loan also. This last is simply a sale on certain terms fixed by the Government and investment of the proceeds.'" Is it possible to set aside those expressions of opinion? What is the nature of this transaction? How ought one to regard it? It appears to me that it has been said by the great authorities to whom I have referred that it is simply a case of a sale on certain terms fixed by the Government, and investment of the proceeds. Whether, therefore, in the books of the Bank they did that or not—and that does not weigh either for or against the Bank—what is the substance of the matter ? How is one to treat it ? I think one must regard it as a definite change of an investment upon certain terms which reveal an enhanced price, and the margin so revealed by that enhancement of the price is a profit, and is therefore a profit which is subject to tax. On these grounds, therefore, I find that there is no distinction in the two operations of the Westminster Bank, and the National Bank falls into line. There is, or was, a realisation at the time when the change of investment was made, even though that was made on terms originally offered to the Banks, or offered to them in respect of a new prospectus, and the new Conversion Loan. For these reasons I have come to the conclusion that Rowlatt J. is right, and the appeals must be dismissed with costs.

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(1) [1919] 2 K. B. 497; [1920] 3 K. B. 35; H. L. sub nom. *Brown* v. *National Provident Institution* [1921] 2 A. C. 222.

(2) [1919] 2 K. B. 497, 508.

(3) [1921] 2 A. C. 222, 232.

GREER L.J. I agree, and I can state my views quite shortly. The points raised in the appeal of the Westminster Bank, if both of them are decided against the Bank, will dispose of the appeal in the case of the National Bank. The substance of the facts in the Westminster Bank case is this: The Westminster Bank, whose business it is, amongst other things, to make investments of the moneys in their hands and to realise profits by means of those investments, in fact invested a very large part of their money in National War Bonds. Those Bonds gave them the right, when the time came, if they thought it advisable to do so, to exchange their National War Bonds for War Loan, and subsequently provision was made by Parliament to enable them to have a further option to change their investment into $3\frac{1}{2}$ per cent. Conversion Loan. With regard to the change which occurred when they converted their National War Bonds into War Loan, their position was this. They had an investment which they could either sell or hold until the due date arrived for payment, and they could thus realise their profit, either by selling at that time or could realise their profit when the due date came; or they were given the opportunity of realising a profit in another way—namely, by taking the equivalent which was offered to them on the terms of the War Bonds in War Loan. It seems to me, whichever of these three courses they took, they were in fact realising a profit, or, rather, to use the words of the statute, "a profit was accruing to them," when they took, instead of selling their War Bonds, War Loan in their place. After all, one must not forget that money is not necessarily value. Money is only a measure of value, and you may realise your stocks or shares by taking something of value without going through the form of, first of all, converting them into money, and, afterwards, converting the money into that which you desire to estimate your realisations of that in which you deal, and it seems to me that, quite apart from authority, the true view of these transactions is that when the Bank decided that they would no longer hold their War Bonds, but would in effect realise them by selling them to the Government and taking payment in War Loan or in Conversion Loan, they were bringing to an end the enterprise on which they had started when they invested in War Bonds, and they had realised a profit on those War Bonds which it was quite simple, when the time came, to quantify into money, as the parties did by agreement before the Commissioners.

My Lord has made it unnecessary for me to refer to authorities, but I should like to say that, in my view, the opinion which I have expressed is that which is to be found, though perhaps only in the form of dicta, in the *Californian* case (1); the *Royal Insurance* case (2); and *Brown* v. *National Provident Institution.* (3)

I agree, for these reasons, that the appeals should be dismissed.

ROMER L.J. In these cases I have felt and, to some extent, I still continue to feel, great doubt, and for this reason: It is admitted that if a company, whose business it is to deal in Stock Exchange and other securities, purchases at par a quantity of stock, say, of 900*l*. nominal value, and that stock subsequently appreciates in value so that it becomes worth 1000*l*., although the company has made a paper profit of 100*l*., that profit is not subject to taxation as such. In such

(1) 5 Tax Cas. 159. (2) 14 Tax Cas. 22. (3) [1921] 2 A. C. 222.

a case it is said that the profit has not been realised. Nevertheless the profit is there and is represented by one-tenth of the stock. Now supposing, without going through the form of sale, without even purporting to sell the stock, the company exchanges it for 1000*l.* value of another stock, it is difficult, at first sight, to see why in that case a profit should be said to be realised any more than it can be said to be realised in the first case. The profit is there and is represented by one-tenth of the purchased stock. Therefore, were it not for the decision to which I will now refer, I should have hesitated long before coming to the conclusion that in the present cases, where there has been a conversion without any one purporting to enter into a transaction of sale and re-investment, that there has been a profit realised. But the case to which I refer is *National Provident Institution* v. *Brown.* (1) In that case Warrington L.J. expresses the view, quite clearly, that in a case of conversion—that was the case of a conversion of some Treasury Bills into National War Loan—the transaction really is a transaction of sale to the Government and re-investment of the proceeds in National War Loan. I think Lord Sterndale was clearly of the same opinion. When the case went to the House of Lords (2) the passage in which Warrington L.J. had expressed his view on the nature of the transaction was in terms approved by Lord Haldane. In view of that case, and of the fact that the other members of the Court take the view that that is really the nature of the transaction, I am not prepared to differ. In those circumstances I agree that the appeals must be dismissed.

Appeals dismissed.

Solicitors for Westminster Bank, Ld.: *Travers-Smith, Braithwaite & Co.*

Solicitors for National Bank, Ld.: *Stephenson, Harwood & Tatham.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

(1) [1920] 3 K. B. 35, 55. (2) [1921] 2 A. C. 222, 232.

W. I. C.

B. S. LYLE, LIMITED *v.* CHAPPELL.

[1930. B. 5277.]

C. A.
1931
Nov. 13, 16, 30.

Money-lender—Loan Transaction—Borrowing to pay off former Loan—Memorandum in Writing—Agreement to borrow—Sufficiency of Memorandum—Moneylenders Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 6.

A borrower had given to a firm of money-lenders a promissory note to secure payment of a loan with interest at a rate exceeding 40 per cent. per annum. Being in arrear to an amount of 170*l.* in respect of principal and 34*l.* the unpaid balance of interest, he agreed to borrow from the money-lenders a sum of 300*l.*, of which 200*l.* should be considered as principal and 100*l.* as interest at 85*l.* 4*s.* per cent. per annum, and that the sum of 300*l.* should be paid by him to them by sixty equal consecutive weekly instalments of 5*l.* each, and that if default should be made in the payment of any instalment then so much of the balance of the 300*l.* as was attributable to principal should become due and payable with interest from the date of default on any overdue payment at the rate of 60 per cent. per annum. A memorandum in writing was delivered by the money-lenders to the borrower and signed by him containing the above mentioned terms and adding a request to the money-lenders that they should allocate the whole of the sum of 200*l.* in settlement of his former indebtedness; and a promissory note for 300*l.* payable as above mentioned was signed by the borrower and delivered to the money-lenders. The borrower having failed to pay the first instalment, the money-lenders issued a specially indorsed writ claiming 204*l.* as principal and interest due on the promissory note:—

Held, that (apart from the question whether the interest charged was excessive and the bargain harsh and unconscionable) no objection could be taken to the repayment of the former loan by means of money borrowed on a fresh loan; that this was the effect of the transaction, and that the memorandum was a truthful record thereof; that assuming it was necessary that the memorandum should on its face refer to the former loan—as to which, *quaere*—it fulfilled this requisite; and that it was a valid memorandum within s. 6 of the Moneylenders Act, 1927.

When an earlier loan is being repaid by means of money borrowed from the same lender on a second loan with different terms of payment, it is not necessary that the lender should actually hand to the borrower the amount due on the first loan and that the borrower should hand it back to the lender in payment of that loan; if the lender cancels the first loan and advances the difference, if any, between the loans he is entitled to say that he has advanced the amount of the second loan.

Spargo's Case (1873) L. R. 8 Ch. 407; *Credit Co.* v. *Pott* (1880) 6 Q. B. D. 295; *Parsons* v. *Equitable Investment Co.* [1916] 2 Ch. 527 followed.

Judgment of Swift J. reversed and new trial ordered.

APPEAL from the judgment of Swift J. in an action tried before the learned judge without a jury.

On April 25, 1930, money-lenders lent to a borrower 150*l.* at 105*l.* interest for a term of six months repayable in monthly instalments of 42*l.* 10*s.* each. The loan was secured by a promissory note for 255*l.*, by the terms of which interest was to run on any instalment in arrear, and a memorandum of the agreement was made and handed to the borrower, who signed it. When the term of six months was nearing its end, the borrower owed 170*l.* on the promissory note and 34*l.* interest on instalments in default, 204*l.* in all. On October 22, 1930, it was agreed between the parties that this 204*l.* with interest thereon should be paid by sixty weekly instalments of 5*l.* each beginning on October 27, amounting to 300*l.*, of which 200*l.* was to be taken as principal and 100*l.* as interest. On the same day a memorandum of this new agreement was signed by the borrower in these terms:—

"To B. S. Lyle, Limited,
16 Old Burlington Street,
London, W. 1.

I agree to borrow from you on October 22, 1930, the sum of Two hundred pounds with the sum of One hundred pounds for interest being at the rate of 85·2 per cent. per annum and upon the terms of a promissory note to be as follows:—

300*l.* London. October 22, 1930.

I promise to pay B. S. Lyle, Ld., or order at 16 Old Burlington Street, London, W. 1, the sum of Three hundred pounds by sixty equal consecutive weekly instalments of five pounds each commencing on October 27, 1930. In the event of default being made in the payment of any instalment or part thereof then in addition to such instalment or part thereof so much of the balance of the said sum of 300*l.* as represents principal shall forthwith become due and payable together with interest from the date of default on any overdue payment at the rate of 60*l.* per cent. per annum until payment.

I hereby authorize and request you to allocate the whole of the above advance of 200*l.* in settlement of my promissory note in your favour dated April 25, 1930.

Dated this 22nd day of October, 1930.

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Signed by me before the loan is made.

I acknowledge to have received a true copy of this document. S. W. Chappell."

The promissory note signed in accordance with this memorandum was in the form following :—

"300*l.* London. October 22, 1930.

I promise to pay B. S. Lyle, Limited, or order at 16 Old Burlington Street, London, W. 1, the sum of Three hundred pounds by sixty equal consecutive weekly instalments of five pounds each commencing on October 27, 1930. In the event of default being made in the payment of any instalment or part thereof then in addition to such instalment or part thereof so much of the balance of the said sum of 300*l.* as represents principal shall forthwith become due and payable together with interest from the date of default on any overdue payment at the rate of 60*l.* per cent. per annum until payment. The amount of the principal advanced in respect of the said sum of 300*l.* is 200*l.* and it was advanced on October 22, 1930. The interest 100*l.* is equivalent to interest at the rate of 85·2 per cent. per annum. S. W. Chappell."

The money-lenders then drew a cheque for 200*l.* payable to the borrower, who indorsed it and handed it back to them. The promissory note and memorandum of April 25, 1930, were then destroyed and that transaction was then noted in the money-lenders' ledger as "closed."

The borrower made default in payment of the first instalment due on October 27, 1930. Thereupon on November 10, 1930, the money-lenders issued a writ specially indorsed with a claim against the borrower as maker of the promissory note of October 22 and stating the following particulars :—

	£	*s.*	*d.*
"Interest due on October 30 . . .	5	0	0
Balance of principal due . . .	196	13	4
Interest at 60 per cent. per annum to November 10	3	6	8
Amount due . . .	205	0	0"

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The plaintiffs further claimed interest from the date of the writ until payment or judgment on the sum of 201*l.* 13*s.* 4*d.* at the rate of 60*l.* per cent. per annum.

The following further particulars were also given for the purposes of Order III., r. 6, of the Rules of the Supreme Court: "(*a*) The plaintiffs are licensed money-lenders; (*b*) The loan was made on October 22, 1930; (*c*) The amount actually lent to the borrower was 200*l.*; (*d*) The rate per cent. per annum of interest charged was 82·2; (*e*) The date when the contract for repayment was made was October 22, 1930; (*f*) A memorandum of the contract was made and signed by the borrower; (*g*) A copy of the memorandum was delivered to the borrower on October 22, 1930; (*h*) No sum has been repaid by the borrower in respect of the said promissory note; (*i*) The amount due but unpaid is 201*l.* 13*s.* 4*d.*; (*j*) The said sum became due on October 30, 1930; (*k*) The amount of interest accrued due and unpaid on the said sum is 3*l.* 6*s.* 8*d.*"

The plaintiffs took out a summons under Order XIV., r. 1, for leave to sign final judgment. The defendant in his affidavit in answer stated that the only money he had ever received was 150*l.*; that he never received a copy of the memorandum of the contract of October 22 nor a copy of the memorandum of the transaction of April 25; that the plaintiffs had therefore failed to comply with s. 6, sub-s. 1, of the Moneylenders Act, 1927 (1), and that the contract

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(1) Moneylenders Act, 1927: "Sect. 6,—(1.) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be.

"(2.) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the sued on was not enforceable. He further submitted that the interest charged was excessive and the transaction harsh and unconscionable within the meaning of s. 1 of the Moneylenders Act, 1900. The Master in Chambers gave the defendant unconditional leave to defend and, among other directions, ordered that the action should be tried before a judge alone.

The case was heard by Swift J. It was proved that on October 22 the plaintiffs handed to the defendant a cheque for 200*l.* payable to him which he then indorsed and handed back to the plaintiffs. The defendant then signed the promissory note for 300*l.* and the memorandum of agreement to borrow 200*l.* with the sum of 100*l.* for interest, concluding with the words: "I hereby authorize and request you to allocate the whole of the above advance of 200*l.* in settlement of my promissory note in your favour dated April 25, 1930."

Swift J. took the view that there was no new loan on October 22 and no memorandum of what actually took place on that date—namely, a substitution of new terms for the repayment of the old loan of April 25; and that the memorandum of October 22 was part of a scheme to deceive the Court. He therefore gave judgment for the defendant.

The plaintiffs appealed.

Stuart Bevan K.C., *Comyns Carr K.C.* and *Fortune* for the appellants. The learned judge has mistaken the object and effect of the transaction of October 22. It was merely a satisfaction of the former loan of April 25, and the substitution of a new loan in its place. It is true that the parties have embarrassed that simple transaction with an unnecessary ceremony whereby the appellants drew a cheque in favour of the respondent and handed it to him, and he immediately indorsed it and handed it back to the drawers. But this performance was not enacted with any intention

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interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act."

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of deceiving the Court, but rather with the view to facilitate the work of those who audit the appellants' accounts. Going through this form does not invalidate the transaction: *Ex parte National Mercantile Bank; In re Haynes.* (1) That case has been doubted in so far as it supports the opinion that money retained by the grantee of a bill of sale to satisfy a debt due to him in the future can be truly stated as paid by the grantee: *Richardson* v. *Harris* (2); *Parsons* v. *Equitable Investment Co.* (3); but in other respects it is good law, and probably formed the precedent upon which the parties acted in the present case. Swift J. has held that there was no loan on October 22; but here again the learned judge was wrong. It has been frequently held under the Bills of Sale Acts that the amount remaining unpaid in whole or in part on an earlier bill of sale may be described as money lent, and that this is a true statement of the consideration so as to satisfy s. 8 of the Bills of Sale Act, 1878: *Credit Co.* v. *Pott* (4); *Parsons* v. *Equitable Investment Co.* (3); *D'Usez* v. *Traffics and Discoveries, Ld.* (5); *Stott* v. *Shaw and Lee, Ld.* (6)

Croom-Johnson K.C. and *Rewcastle* for the respondent. The learned judge was right in giving judgment for the respondent, because the note or memorandum of the contract is insufficient in that it does not set out the terms of the earlier contract of April 25. The cases on s. 8 of the Bills of Sale Act, 1878, only affect the statement of the consideration, not that of the contract as a whole. There must be a memorandum of the whole contract for the purposes of the Moneylenders Act, 1927. This point has been decided by Charles J. in an action of *Dunn Trust, Ld.* v. *Teale* (7), tried by that learned judge in June, 1928, at Leeds Assizes, in which the plaintiffs, a firm of money-lenders, claimed 500*l.* with 25*l.* interest under a promissory note dated January 25, 1927. The defendant originally owed 210*l.* to a firm of

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(1) (1880) 15 Ch. D. 42.
(2) (1889) 22 Q. B. D. 268.
(3) [1916] 2 Ch. 527.
(4) 6 Q. B. D. 295.
(5) (1924) 40 Times L. R. 441.
(6) [1928] 2 K. B. 26.
(7) (1928) Unreported. An account of the case will be found in The Yorkshire Post of June 9, 1928.

M. Dunn, Ld., which went into voluntary liquidation in 1926. When the 500*l.* was borrowed from the plaintiffs, two cheques were drawn by the plaintiffs' representative in favour of the defendant. One of these was for 210*l.* This one was then indorsed by the defendant and handed back to the plaintiffs' representative in payment of the debt due from the defendant to M. Dunn, Ld. The second cheque was for 290*l.*, and was kept by the defendant. Charles J. held that it was a condition of the loan of 500*l.* that 210*l.* should be paid in discharge of the old loan, and that as the memorandum contained no mention of this condition, it was insufficient and the plaintiffs could not recover. If in the present case the memorandum had stated the terms of the earlier loan, it would have appeared that the new agreement imposed on the respondent an obligation to pay compound interest on 30*l.* part of the 200*l.* taken to be the principal debt on the second loan. This interest is irrecoverable by s. 7 of the Moneylenders Act, 1927, and therefore the memorandum fails to express the legal effect of the agreement sued upon. Furthermore, prima facie the interest charged on the earlier loan was excessive and the transaction was harsh and unconscionable by virtue of s. 10 of the Moneylenders Act, 1927. Until the Court had decided that the presumption was rebutted, it could not be said that the amount of the original loan or any part of it was recoverable by the appellants: *Mills Conduit Investment, Ld.* v. *Leslie.* (1)

The promissory note sued on was a renewal of the former note, which ought therefore to have contained the terms of renewal. This it presumably did not do. If it is objected that it could not have done so, the conclusion is that the Legislature did not intend that money-lenders' loans should be renewed.

Comyns Carr K.C. in reply. The question whether the interest charged is harsh and unconscionable has never been tried, owing to the course taken at the trial.

Cur. adv. vult.

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(1) Ante p. 233.

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1931. Nov. 30. The following written judgments were delivered:—

SCRUTTON L.J. Swift J. has dismissed an action by money-lenders against a borrower on a promissory note on the ground that there is no sufficient memorandum of the transaction under s. 6 of the Moneylenders Act, 1927. The money-lenders appeal.

The facts are as follows: The two parties had been concerned in money-lending transactions for some years. On April 25, 1930, the money-lenders lent the borrower 150*l.* at 105*l.* interest for six months, repayable by six monthly instalments of 42*l.* 10*s.* each. The interest was stated to be 240 per cent., a rate which under s. 10 of the Act of 1927 would be deemed to be prima facie "harsh and unconscionable," so that to take any legal proceedings, whether the borrower consented to judgment or not, the money-lenders must prove that the rate was not harsh and unconscionable. The loan was secured by a promissory note under which, in default of any instalment, interest ran on the instalment. The memorandum of this loan and the promissory note have been destroyed, the transaction being entered in the ledger as "closed" by the events next to be mentioned.

As might be expected, the borrower did not pay his instalments punctually, and when the six months were expiring had only paid two instalments, and those late. This left him owing 170*l.* on the promissory note and interest said to be 34*l.* on the instalments in default. This latter amount does not seem to have been checked or verified. The ledger shows on the credit side 255*l.*, the amount of the promissory note, and five entries of 42*l.* 10*s.*; on the credit side seven entries of 42*l.* 10*s.* To this are added 30*l.* on the debit side, described as "additional interest," making in all 497*l.*, and on the debit side 200*l.*, not described at all, making also 497*l.*, and the transaction is then described as "closed." What in fact happened was that further time was given by treating the indebtedness on October 22 as 200*l.*—170*l.* principal, being 255*l.* less 85*l.* paid, adding 30*l.* for interest on instalments in default, and then agreeing that the whole 200*l.* and interest thereon should be paid off by sixty weekly instalments of 5*l*., beginning on October 27, 1930, making 300*l*. in all, 100*l*. being charged for interest on the 200*l*., the rate being stated to be 85·2 per cent., which also is to be deemed to be harsh and unconscionable under s. 10 till the contrary is proved. It seems obvious that by reason of the provisions of ss. 7, 15, sub-s. 2, and the First Schedule, compound interest is being charged on this transaction, both on the 30*l*. additional interest and on that portion of the 170*l*. not repaid, which would represent the amount appropriated to interest under s. 15, sub-s. 2.

The transaction was carried out in fact by the money-lenders handing to the borrower a cheque for 200*l*., which the borrower indorsed and handed back to the money-lenders, who treated it as settling the first transaction, and by the borrower signing a promissory note for 300*l*. repayable by sixty weekly instalments of 5*l*. commencing on October 27, 1930, and a memorandum agreeing to borrow 200*l*. with the sum of 100*l*. for interest upon the terms of the promissory note. The memorandum concluded: "I hereby authorize and request you to allocate the whole of the above advance of 200*l*. in settlement of my promissory note in your favour dated April 25, 1930."

Swift J. took a very unfavourable view of the transaction; he held there was no loan on October 22, that there was an attempt to deceive the Court and the money-lenders' auditors, that the real object of the parties was to substitute terms of repayment for an old loan which the money-lenders could not get paid on the terms originally agreed. I see no reason for taking such an unfavourable view of the transaction. The memorandum may be insufficient without imputing fraud, and the suggestion that the plaintiffs' manager had said that the memorandum was in the form it was on legal advice in order to deceive the plaintiffs' auditors—a most extraordinary statement—is, I think, a misunderstanding of the statement that it was "for the purposes of the auditors."

The money-lenders were in this difficulty. First, they or their legal advisers took the view that there could not be a legal memorandum of a renewal of a loan on altered terms,

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because the Act required a memorandum before the money was lent or the security given, which they read as referring to the original loan or security, and not to the terms substituted later. Secondly, they had to consider a judgment of Charles J. in *Dunn Trust Ld.* v. *Teale* (1), at Leeds Assizes in 1928, in which he held that where an old debt purported to be settled by a new loan, a statement to that effect must appear in the memorandum. As to the first point, I find it difficult to believe that Parliament intended to render renewals of loans or of the securities for them on altered terms impossible by requiring that a memorandum of the alteration should be signed before the original loan was made. In my opinion, when the time for payment of the original loan has expired without complete repayment, and the time for repayment is extended or altered, there is a fresh loan, and it is sufficient if the memorandum of the altered terms precedes the commencement of the extended period. The draftsmanship of s. 6 might be better, but I cannot think that Parliament intended to render renewals impossible. As to the second point, I see no objection to the procedure of wiping off the old loan by treating it as a new loan on the altered terms, when the fact that this is being done is shown on the face of the second memorandum.

The question of a new loan being used either in whole or in part to repay an old loan has been frequently considered under the Bills of Sale Acts and the clause therein requiring the consideration to be truly stated. Where the bill of sale stated that a sum of money was now paid, and in fact either the sum had not been actually paid, but used to discharge an old loan, or had been handed over, but at once handed back to the lender, the result of the authorities, of which *Credit Co.* v. *Pott* (2) is the principal, is stated by Lord Cozens-Hardy M.R. in *Parsons* v. *Equitable Investment Co.* (3) as follows: "Now the following propositions seem to me to be established by the authorities. In the first place, a sum of money paid by the bill of sale holder at the grantor's request

(1) (1928) Unreported.
(2) 6 Q. B. D. 295.
(3) [1916] 2 Ch. 527, 530.

to a creditor or another person is properly described as a payment to her. This justified the payment of 100*l.* to Osborn & Osborn. In the second place, if there is a sum of money due from the grantor to the bill of sale holder less than the sum professed to be advanced, the retention of that sum and payment of the difference only to the grantor may be treated as payment of the whole sum to him. This proceeds on the well known principle of which *Spargo's Case* (1) is an illustration, namely, that it is not necessary to go through the form of handing the entire loan to the grantor and for her then to return the amount to be retained. Such a transaction would be within a plea of payment under the old law. In the third place, this doctrine has no application unless the amount retained is at the time due and payable. It will not justify the retention of an amount secured by bills or acceptances not yet due. In the fourth place, the retention by the bill of sale holder of moneys not yet due is, in the language of Fry L.J. in *Richardson* v. *Harris* (2), the taking of a bonus 'which does not appear on the statement of the consideration.' In the present case it seems to me that the defendants have done exactly that which in *Richardson* v. *Harris* (2) this Court said could not be done, and on that ground I think the bill of sale is void."

It was tentatively suggested that the amount retained was not yet due, because there had been no legal proceedings to decide whether the interest prima facie harsh and unconscionable could be justified. But while the decision of the full Court of Appeal was that the consent of the borrower did not entitle the lender to judgment, there is no objection to the borrower agreeing to pay and paying sums agreed to be due without legal proceedings, subject to any question of afterwards reopening accounts.

On the memorandum itself, I think an agreement to borrow is a description which properly includes an agreement to borrow on fresh terms in order to pay off an old loan. This transaction is disclosed on the face of the memorandum, in pursuance of the decision of Charles J., which it is safer

(1) L. R. 8 Ch. 407.

(2) 22 Q. B. D. 268, 276.

to follow, though the bills of sale cases suggest it is unnecessary. It is further said that while the borrower authorizes the repayment, the lender does not bind himself to accept it. I do not think this is an accurate view of the effect of the memorandum.

In my opinion therefore the decision of Swift J. to dismiss the action on the ground that there is no sufficient memorandum is erroneous, and I do not think he was justified in finding any attempt to deceive the Court. But the amount due still remains to be fixed. The case must go back for a new trial, in which the effect of the two prima facie harsh rates of interest, 240 per cent. and 85 per cent., will have to be considered, and the question of compound interest investigated. The plaintiffs must have the costs of the appeal; the costs of the first trial must be referred to the judge who hears the new trial. In my opinion, as a general rule, a money-lender who is found to charge harsh or unjustifiable interest should not get any costs of the trial which establishes what he is entitled to; in some cases the borrower may be given costs against the money-lender plaintiff who has tried to recover harsh interest and failed.

Greer L.J. This is an appeal from the judgment of Swift J. in an action in which the plaintiffs, who are money-lenders, claim from the defendant a sum of 205*l.* due under the terms of a promissory note dated October 22, 1930. The defendant put in a defence whereby several grounds of defence to the action were set out. The only one with which this Court is concerned is the one pleaded in para. 7 of the defence, to the effect that s. 6 of the Moneylenders Act, 1927, had not been complied with, and that therefore the promissory note, being a contract for the repayment of money lent, was unenforceable.

The facts material to this issue proved at the trial are that the defendant had, on April 25, 1930, obtained an advance from the plaintiffs of 150*l.* and had signed a promissory note stating the terms of the advance as the sum of 255*l.* payable by six monthly instalments of 42*l.* 10*s.* At the time when the promissory note, the subject matter of this action, was signed, he had only paid two instalments, that is to say, 85*l*., leaving 170*l*. due in respect of the promissory note for 255*l*. and a further sum for interest which amounted to a few shillings over 30*l*.

The plaintiffs' representative, Mr. Scott, approached the defendant and pointed out to him that as he obviously could not meet the instalments, some arrangement ought to be made that would help him to pay off his account and set his affairs in order. As reported in the Times Law Reports (1) the learned judge stated the facts thus: "On October 9, 1930, the plaintiffs were unable to get any money out of the defendant. He had failed in his payments, and it was obvious that he could not pay, and on October 9 the plaintiffs wrote him a letter in which they said that they had a proposal to make to him which would help him to pay off his account and straighten out his affairs. At that time the plaintiffs were despairing of getting money out of the defendant on the basis of the old contract, and were suggesting means of easing the situation. The plaintiffs' manager, Mr. Scott, who had everything to do with the transactions, said that there was a telephone conversation and that arrangements were made over the telephone. He (his Lordship) was satisfied of what happened—whether it was on the defendant's own initiative or whether, as his counsel had said, he was 'chivied' into it, he could not say. It was clearly established by the evidence that on October 22, in whatever circumstances it was made, there was an agreement between the plaintiffs and the defendant that the latter should be relieved from the liability which he was under to the plaintiffs in exchange for signing a new promissory note for 300*l*., including 100*l*. interest, the whole amount to be repayable by sixty instalments of 5*l*. a week. There was then the existing debt owing by the defendant to the plaintiffs, who thought it was hopeless to get their money. A new bargain was made, and for the old debt and the security for the debt there was substituted the promissory note for 300*l*."

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(1) 47 Times L. R. 562, 563.

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It appears from this that the learned judge found that before the documents which we have to consider were signed, it had been agreed that the defendant was to be relieved of the liability which he was under in the existing state of things, and he was to sign a promissory note for 300*l.*, including 100*l.* interest, the whole amount to be repayable by sixty instalments of 5*l.* per week. This arrangement, it seems to me, could not be carried out without in some way discharging the old liability. A mere renewal or giving of further time to meet the old liability would not have met the situation. This was the position of the parties when Mr. Scott brought the document of October 22 to the defendant for signature. There does not seem to me to have been any final agreement before the document was signed as to how the relief from the old debt which had been agreed to by the parties should be effected, and nothing had happened which would in any way prevent the parties from carrying out the suggested arrangement in whatever manner they were both prepared to agree to. In my view the document signed by the defendant, which appears on p. 1 of the correspondence, is an agreement by him to discharge whatever was due on the promissory note of April 25 by borrowing from the plaintiffs a sum of 200*l.*, and authorizing them, instead of physically handing over the money to the defendant, to pay themselves the 200*l.* The money-lenders seem to have thought it necessary or desirable that they should physically hand over a cheque for 200*l.* to the defendant and get it back again, but there is nothing in the agreement to the effect that this should be done, and in my judgment it was not essential that the agreement should be carried out in that way. If the money to be borrowed was intended to be used for the extinction of the debt agreed by the parties at 200*l.*, it seems to me unnecessary that the parties should go through the idle form of passing the cheque backwards and forwards. If the contract had provided for the borrowed money to be paid over to the defendant and then repaid to the plaintiffs, it would, according to the authorities, have been unnecessary to go through the form of handing over the money.: *Credit*

Co. v. *Pott.* (1) I cite this case for the principle involved in the decision, though the questions involved in bills of sale cases are not the same as the questions involved in moneylending cases. The question in a bill of sale case is, whether a statement in a bill of sale that the money was paid is a true statement or not, which is not necessarily the same as the question whether the memorandum of contract is a sufficient memorandum under s. 6 of the Moneylenders Act. The principle for which I refer to the case of *Credit Co.* v. *Pott* (1) is that which is stated in the judgment of Lord Selborne, where he quotes with approval the following statement from Mellish L.J. in *Spargo's Case* (2): "It is a general rule of law, that in every case where a transaction resolves itself into paying money by A. to B., and then handing it back again by B. to A., if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards."

In the later bill of sale cases, like *Richardson* v. *Harris* (3), it was held that the consideration was not truly stated if only part of it was the set off of an existing debt, and the rest of it was either a settlement of amounts expected to become due in the future, or an agreed sum which was not a liquidated debt before the date of the bill of sale. In the present case we are not troubled with the question whether a statement that the money was paid is a true statement. The amount of the old debt was agreed either at the time of or before the signature, at something less than what it really was, and it was part of the agreement that the lesser sum of 200*l.* should be withheld by the lenders as payment for the amount agreed to be due.

In my judgment the oral agreement made, as found by the learned judge, that the defendant should be relieved from his liability, could not be carried out by a renewal of the old debt with a grant of further time to pay it, plus additional interest. It could only be carried out by some

(1) 6 Q. B. D. 295, 298.
(2) L. R. 8 Ch. 407, 414.
(3) 22 Q. B. D. 268.

method whereby the old debt would be extinguished and a new one created. The method of doing this was agreed by the defendant with the plaintiffs when he signed the memorandum of October 22. There was nothing fraudulent or deceptive about this document, nor was it, in my judgment, a sham. It appears to me to be a truthful record of the way in which the parties agreed that the old debt agreed at 200*l.* should be extinguished by a fresh borrowing of 200*l.* to be used for the discharge of the old debt, and by terms as to the method of payment of the new obligation created by the new loan and the agreement in respect of it.

In my judgment the document of October 22 signed by defendant is a sufficient memorandum of a contract for the repayment by the defendant as the borrower of 200*l.* lent to him on October 22, 1930, within the meaning of s. 6. It appears to have been held in a case at Leeds by Charles J. that unless money was actually handed over by the lender to the borrower, it could not be said that any note or memorandum was signed before the money was lent. In my judgment this is taking too strict a view of the meaning of s. 6. I think money is lent within the meaning of that section if it is applied by the lender to the purposes of the borrower in any way which the borrower authorizes.

I think the learned judge was wrong in stopping this case, as he did, on the ground of the absence of any memorandum such as is required by s. 6, and that there must be an order for a new trial, as there are other defences and a counterclaim for relief to be investigated before any judgment can be given either for the plaintiff or for the defendant.

SLESSER L.J. In this action the plaintiff company, a firm of registered money-lenders, sued the defendant to recover 205*l.* as money lent and interest thereon, in circumstances stated by Scrutton L.J., which I do not repeat in detail.

The claim was against the defendant as maker of a promissory note in favour of the plaintiffs, dated October 22, 1930, for 300*l.* repayable by weekly instalments of 5*l.* each, with a proviso that should default be made in the payment

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of any instalment, the whole of the balance of the sum advanced and interest should forthwith become due and payable. There was default in payment of the first instalment, and the 205*l.* claimed represents the amount of principal and interest which thereupon became due.

On April 25, 1930, the defendant had borrowed 150*l.* from the plaintiff company, in respect of which he signed a promissory note for 255*l.* and gave six cheques in their favour for 42*l.* 10*s.* each. The third of these cheques was dishonoured, and, on October 9, 1930, the plaintiff company wrote to the defendant offering a means which it was suggested would help him to pay off his account. According to the learned judge, on October 22 it was orally agreed between the plaintiff company and the defendant that the latter should be relieved from the liability which he was under to the plaintiffs in exchange for signing a new promissory note for 300*l.*, including 100*l.* interest, the whole amount to be repayable by sixty instalments of 5*l.* per week.

In my judgment, this agreement of October 22, 1930, was an agreement for a loan on new terms, one of which terms was that the defendant should use 200*l.* in settlement of his earlier promissory note of April 25, 1930, the remaining 100*l.* being interest at the rate of 85·2 per cent. per annum.

The defendant has pleaded as one of his defences s. 6 of the Moneylenders Act, 1927, which requires (inter alia) that a note or memorandum in writing shall be signed by the borrower before the money is lent or the security given, which note or memorandum shall contain all the terms of the contract as set out in sub-s. 2 of that section. If this be not done the contract for the repayment by the borrower is declared to be unenforceable. In my view, in this case the plaintiffs exactly complied with the requirements of the section. The note or memorandum, which was made and signed personally by the borrower before the money was lent or the security given, exactly sets out all the terms of the contract. In particular it states that the defendant authorized and requested the plaintiffs to allocate the whole of the above advance of 200*l.* in settlement of his promissory note in their favour dated April 25, 1930.

There is evidence to the effect that the money-lenders handed a cheque for 200*l.* to the defendant and received it back again. This proceeding, though probably unnecessary (see *Credit Co.* v. *Pott* (1)), was not improper, nor can I see that it was calculated to deceive any tribunal which might have to decide whether there was a loan or not, as was suggested by the learned judge.

In the case of *Dunn Trust, Ld.* v. *Teale* (2), a case heard at the Leeds Assizes, the defendant had borrowed from a money-lending company, M. Dunn, Ld., 210*l.* M. Dunn, Ld., went into liquidation, and Mr. Teale borrowed 500*l.* from a new firm under the same management, Dunn Trust, Ld., 210*l.* of which was made out to Mr. Teale in a cheque which he handed back in payment of the old debt. The other 290*l.* he kept; mention of this liquidation of the old debt did not appear in the memorandum of the contract. In so far as, in the opinion of Charles J., it was a vital part of the contract of loan that the 210*l.* transaction in payment of the old loan should take place, the learned judge held that the term as to the 210*l.* should have been incorporated in the memorandum which, without it, did not contain all the terms of the contract, and so for failure to comply with s. 6, the contract for repayment was unenforceable. Sect. 6 provides that the memorandum must be signed before the money is lent. If the terms on which the money is lent are subsequently varied by agreement between the parties, but there is no further loan, difficulties may arise in that the contract containing the variation of the terms cannot be signed before the money is lent, as the varied contract was, ex hypothesi, not in existence at that time. The method employed in the present case may have been devised as a means to overcome this difficulty and to comply with s. 6 of the Act and as a means to avoid the failure to incorporate all the terms of the loan which caused Charles J. in the case to which I have referred to hold that the requirements of

(1) 6 Q. B. D. 295.

(2) Unreported.

s. 6 were not satisfied. In any event the memorandum here appears to me to be an accurate statement of the agreement between the parties and, as such, to be unimpeachable.

The learned judge, without hearing that part of the defence and counterclaim which dealt with the defendant's counterclaim to have the transaction reopened and an account taken and for relief, or with that part of the defence which says that the interest was excessive and the transaction harsh and unconscionable, gave judgment for the defendant with costs on the ground of the plaintiff company's failure to comply with s. 6 as above stated. As this course, in my view, was wrong, there must be a new trial in order that the other matters raised in the defence may be investigated, and the appeal must be allowed on the terms stated by my Lord.

New trial ordered.

Solicitor for appellants: *M. A. Jacobs.*
Solicitors for respondent: *Good, Good & Co.*

W. H. G.

K. B. D.
1931
Oct. 14.
C. A.
Dec. 16, 17.

W. T. LAMB AND SONS *v.* GORING BRICK COMPANY, LIMITED.

[1930. L. 306.]

Principal and Agent—Appointment as "Sole selling Agents"—Sale by Principal—Breach of Contract.

By an agreement in writing certain manufacturers of bricks and other building materials appointed a firm of builders' merchants "sole selling agents of all bricks and other materials manufactured at their works." The agreement was expressed to be for three years and afterwards continuous subject to twelve months' notice by either party. While the agreement was in force the manufacturers informed the merchants that they intended in the future to sell their goods themselves without the intervention of any agent, and thereafter they effected sales to customers directly. In an action by the merchants against the manufacturers for breach of the agreement:—

Held, by Wright J. and the Court of Appeal, that the effect of the agreement was to confer on the plaintiffs the sole right of selling the goods manufactured by the defendants at their works, so that neither the defendants themselves nor any agent appointed by them, other than the plaintiffs, should have the right of selling such goods.

Snelgrove v. *Ellringham Colliery Co.* (1881) 45 J. P. 408 considered, and followed by Scrutton L.J.

Dicta of the Chief Judge in Equity of New South Wales in *Cant* v. *Miller* (1913) 13 N. S. W. S. R. 505, and of McCardie J. in *Bentall* v. *Vicary* [1931] 1 K. B. 253, not adopted.

Held, by Greer and Slesser L.JJ., that the agreement was one of vendor and purchaser and not one of principal and agent, and that *Snelgrove* v. *Ellringham Colliery Co.*, supra, and *Bentall* v. *Vicary*, supra, were not relevant.

Action tried by Wright J. without a jury.

By an agreement in writing dated April 21, 1927, the defendants, who were manufacturers of bricks and other building materials, appointed the plaintiffs, who were builders' merchants, "sole selling agents of all bricks and other materials manufactured at their works." The agreement was expressed to be for three years and "afterwards continuous subject to twelve months' notice by either party." Business proceeded under the agreement until, by a letter dated September 25, 1929, from the defendants, by their accountants, to the plaintiffs, the plaintiffs were informed that the defendants intended in the future themselves to sell all bricks manufactured by them without the intervention of an agent. Thereafter the defendants themselves sold some, or all, of their bricks directly to customers without the intervention of the plaintiffs. Subsequently, twelve months' notice to terminate the contract was given by the defendants.

The plaintiffs brought the present action claiming damages for breach of contract, a declaration that during the currency of the agreement the defendants were not entitled to sell any bricks or other materials except through the plaintiffs, and an account. The defendants denied that they had repudiated or broken the agreement or that the plaintiffs had suffered any damage.

A. M. Sullivan K.C. and *Reginald T. Sharpe* (*Maurice Healy K.C.* with them) for the plaintiffs. The plaintiffs are entitled to succeed. The effect of the words in the agreement appointing them "sole selling agents" was that they, and they alone, during the currency of the agreement, had the right to sell all bricks and other materials manufactured by the defendants at their works. No term should be implied in the agreement excluding from this general provision sales by the defendants themselves without the intervention of any agent. To apply to the present case the words of Mathew J., in *Snelgrove* v. *Ellringham Colliery Co.* (1), the defendants were not entitled "to effect any sales or transact any business connected with their firm" during the existence of the agreement "except by means of [the plaintiffs'] agency." *Bentall* v. *Vicary* (2) was decided on its special facts.

Blain for the defendants. The defendants have not been guilty of any breach of contract. The words "sole selling agents" in the agreement mean merely that, if the defendants sold through any agents, it must be through the plaintiffs. There is no express term in the agreement prohibiting sales by the defendants themselves and no such term need be implied to give "business efficacy to the transaction": see per Bowen L.J. in *The Moorcock.* (3) If the parties had intended such a prohibition nothing would have been easier than to have inserted the appropriate words: per McCardie J. in *Bentall* v. *Vicary*. (1) It is submitted that the decision in that case should be followed in the present case. The decision in *Snelgrove* v. *Ellringham Colliery Co.* (2) went no further than that the defendant firm, in soliciting orders by one of their partners, were doing so by an agent other than the plaintiff who had been appointed their "sole agent": see per the Chief Judge in Equity of New South Wales in *Cant* v. *Miller* (3) and per McCardie J. in *Bentall* v. *Vicary*. (4)

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(1) 45 J. P. 408.

(2) [1931] 1 K. B. 253.

(3) (1889) 14 P. D. 64, 68.

Wright J. By its express terms the letter of September 25, 1929, declared the intention of the defendants in the future to sell all their bricks without any intervention on the part of the plaintiffs and so entirely to abrogate the function of the plaintiffs as selling agents. Is that consistent with the terms of the agreement of April 21, 1927? In my judgment, it is not. The agreement is a commercial document. It is well known that in certain branches of trade a division of functions is common between manufacturers or producers on the one hand and merchants or salesmen on the other, and I think that the fair construction of this agreement is that the parties intended that, the manufacturing part of the business being in the hands of the defendants, the merchanting or selling part of the business should be entrusted to the plaintiffs. The plaintiffs, as merchants, it might be assumed, had the necessary selling organization, the necessary connection with possible buyers, and the hope of making bargains in the best way. It was the promise of the plaintiffs to put their organization and their services at the disposal of the defendants which formed the consideration for the promise on the part of the defendants to entrust to the plaintiffs the selling part of the business.

In my opinion, the words in the agreement, "appoint the plaintiffs sole selling agents of all bricks and other materials

(1) [1931] 1 K. B. 253, 258.

(2) 45 J. P. 408.

(3) 13 N. S. W. S. R. 505, 509.

(4) [1931] 1 K. B. 253, 260.

manufactured at [the defendants'] works," mean that the plaintiffs were to have the sole right of selling in their capacity as agents all the bricks and other materials manufactured by the defendants at their works without any reservation in favour of the defendants themselves. It does not appear to me that in a contract of this nature there is any need to introduce any implied term into it to give "such business efficacy to the transaction as must have been intended at all events by both parties who are business men": per Bowen L.J. in *The Moorcock.* (1) I think that the business sense of the words of the agreement in their natural and true interpretation is what I have stated. In any other view, during the currency of the agreement it would always have been open to the defendants to remove from the plaintiffs the power to sell the bricks and other materials which they (the defendants) produced. At any moment the defendants would have had the option of taking the whole of the business out of the plaintiffs' hands and availing themselves of the connection which had been brought into operation through the efforts of the plaintiffs. In other words, all that the agreement would have given to the plaintiffs would have been the possibility that the option which the defendants claim to be entitled to exercise would not be exercised for some time.

I am supported in the view which I have expressed with regard to the construction of this agreement by the decision of Mathew J. in *Snelgrove* v. *Ellringham Colliery Co.* (2) The defendants there, a partnership firm, were manufacturers of fire-clay goods and they appointed the plaintiff their sole agent for the sale of their goods at a fixed scale of commission within a certain area. After a while the plaintiff discovered that the defendants, through one of their partners, were soliciting orders in the district at more favourable terms. In giving judgment, Mathew J. said: "Putting the best interpretation, however, upon the agreement between the parties, I am of opinion that this gentleman [i.e., the plaintiff] was to be the agent for the defendants, who, I assume, are ordinary partners, and that they were not entitled to appoint any other agent in his district, nor were they entitled to effect any sales or transact any business connected with their firm in his district, except by means of his agency."

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(1) (1889) 14 P. D. 64, 68.

(2) 45 J. P. 408.

In my opinion, that is a clear decision in the same sense as that which I have already indicated as my own. It is, however, said that that is not the true meaning of the decision of Mathew J., and that all he decided was that the defendants were debarred from selling their goods in the plaintiff's district through any other agent than the plaintiff, and that they were doing so because one of their partners was the agent of the firm to do the acts complained of. In a sense, of course, a partner, in transacting any business for the partnership firm, is an agent of that firm, just as, in the present case, any sales made by the defendant company must be effected by some agent of the company, but I do not think that such an agreement as we are dealing with here can be construed in the way for which Mr. Blain has contended. Nor do I think that Mathew J. intended so to limit his judgment as has been suggested because, I think, he treated the sales, or attempts to sell, on the part of the partner in the defendant firm as being the direct acts of the members of the firm, just as in the present case sales by a director of the company would be the direct acts of the company. I do not think that, either in *Snelgrove* v. *Ellringham Colliery Co.* (1) or in the present case, the true view ought to be that there was an employment by the defendants of some agent other than the plaintiff. In my view, Mathew J. meant that the effect of appointing the plaintiff in *Snelgrove* v. *Ellringham Colliery Co.* (1) sole agent for the sale of the defendants' goods was to put the sole right of selling in the plaintiff and so, in the present case, I think that the effect of appointing the plaintiffs "sole selling agents" was to put into their hands the sole right of selling the goods manufactured by the defendants, not only as against any other agent whom the defendants might appoint, but also without reservation in favour of the defendants themselves.

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(1) 45 J. P. 408.

My attention has been called to the fact that, in *Cant* v. *Miller* (1) the Chief Judge in Equity in New South Wales said : " In *Snelgrove* v. *Ellringham Colliery Co.* (2) Mathew J. seems to have considered that in the contract before him, the defendant was forbidden to sell as principal. It was not apparently necessary to decide this, for the defendants in that case were a firm, A., B., and C., and the sales complained of were made by C., as agent of the firm. The defendants were, therefore, breaking their contract not to sell through any agent other than the plaintiff." With all respect to the Chief Judge in Equity I can only repeat that, in my opinion, that was not the view taken by Mathew J. In cases of this kind " agent " means something different from the principal, or the employee of a firm which is the principal.

I was also referred to *Bentall* v. *Vicary* (3), where the defendant, the owner of property, appointed the plaintiffs, who were estate agents, his " sole agents for the sale of the property " for a stipulated period. During the period of the agency the defendant negotiated personally and quite apart from the plaintiffs with a purchaser who had never had any communication with the plaintiffs and whom the plaintiffs did not know. The result of the negotiations was that the property was sold to this purchaser. In an action by the plaintiffs in which they claimed from the defendant damages for breach of contract, McCardie J. held that the plaintiffs were not entitled to damages, as the special contract in question contained no express prohibition against a sale by the defendant himself, and the implication of such a prohibition was not necessary to give business efficacy to the transaction. That may well have been a proper view to have taken in that case, but I have already indicated that, in the case before me, the matter can properly be decided on the clear language of the contract. McCardie J. refers in his judgment (4) to *Snelgrove* v. *Ellringham Colliery Co.* (2), and takes the view that the case was decided simply on the ground that the acts of the partner of the defendant firm were those of an agent of the firm, and that, in so far as Mathew J., if he did so at all, proceeded on the ground that they were the acts of a principal, his remarks were obiter dicta. I have already expressed, with deference, a different view. The other cases referred to by McCardie J. in his judgment do not appear to give much assistance in the decision of the present case.

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(1) 13 N. S. W. S. R. 505, 509.

(2) 45 J. P. 408.

(3) [1931] 1 K. B. 253.

(4) [1931] 1 K. B. 259, 260.

In my judgment, the plaintiffs are entitled to succeed on the ground that, by the letter of September 25, 1929, the defendants repudiated and broke the agreement of April 21, 1927. No doubt some method will be adopted to determine what damages are payable.

Judgment for plaintiffs.

G. F. L. B.

The defendants appealed. The appeal was heard on Dec. 16 and 17, 1931.

van den Berg K.C. and *Blain* for the appellants.

A. M. Sullivan K.C., *Maurice Healy K.C.* and *R. T. Sharpe* for the respondents, were not called upon.

Scrutton L.J. This is an appeal from a decision of Wright J. who has, without going into the question of amount, made an order that the plaintiffs are entitled to damages for breach of an agreement entered into between the parties. The agreement is a short one, and if it were read without any knowledge of the surrounding circumstances or facts its meaning might be doubtful. To the parties it presented no difficulty whatever, and for two years and a half they acted upon it, until some third person, who until then had not been concerned in the matter, bought up all the shares in the appellant Company. This person apparently took a view of the meaning of the agreement different from that taken by the parties to it who had been working on it for over two years. He acted upon his view. Hence this action.

The agreement was made between persons who manufacture bricks and other persons, described as "merchants," who by the agreement are to be the "sole selling agents of all bricks and other materials manufactured at their"—the appellants'—"works." Now it is well known that in certain trades the word "agent" is often used without any reference to the law of principal and agent. The motor trade offers an obvious example, where persons described as "agents" are not agents in respect of any principal, but are purchasers who buy from manufacturers and sell independently of them; and many difficulties have arisen from this habit of describing a purchaser, sometimes a purchaser upon terms, as an agent.

By this particular agreement the respondents, therein called the "manufacturers," the makers of the bricks, appoint the "merchants," the buyers of the bricks from them and sellers of the bricks to builders and contractors, "sole selling agents of all bricks and other materials manufactured at their works." It continues: "The price which the merchants shall pay the manufacturers for the said bricks and other materials shall be mutually agreed from time to time and shall be based upon a figure which shall allow the merchants not less than 10 per cent. on the current market price to builders."

In his argument for the appellants Mr. van den Berg took a point which had not before occurred to any one—namely, that those words, "The price . . . . shall be mutually agreed from time to time and shall be based," etc., did not impose an enforceable term and only amounted to an agreement to make an agreement, and being an ineffective agreement, could not form the basis of a claim for damages. In our opinion that point cannot now be raised either in this Court or on the assessment of damages. If it had been raised in the Court below evidence must have been called to show how the parties had acted upon the agreement contained in the clause. As a matter of fact there were handed to us, against a vigorous protest by Mr. van den Berg, certain documents which showed that the appellants themselves sent in accounts as sellers to the respondents stating the price at which the goods were sold, apparently the current market price, and deducting 10 per cent.; and no objection seems to have been raised by the respondents to this mode of ascertaining the price payable under the clause. But apart from that, it is too late to take the point now.

The question then is what the agreement means. It goes on: "The merchants shall pay the manufacturers for all goods supplied by the end of the month following delivery. This agreement to be for three years and afterwards continuous subject to twelve months' notice by either party." This is very different from an agreement by which an owner of real property employs an agent to sell an estate once for all upon the terms that if the agent finds a purchaser he shall be paid a commission upon the price and that he is to be the sole agent. That class of cases is well defined. *Bentall* v. *Vicary* (1) before McCardie J. is an example, in which the learned judge held that it was open to the owner of the property to sell it himself and to say to the agent, "You have not introduced a purchaser, and there is no term in our contract which prevents me from finding a purchaser myself." The learned judge is careful to add, and I emphatically agree, that no general rule can be laid down and that the wording of the agreement in each case must be carefully considered. The agreement in the present case is one of a different class, contemplating contractual relations extending over a period of three years or more, dividing the business of manufacture from that of distribution, whereby the one party, the manufacturers, are to make the goods for three years and the other party, the merchants, are to continue selling them for three years and paying the price monthly to the manufacturers. Here the words "sole selling agents" have a distinct meaning implying that the manufacturers are to sell to no one but the merchants who pay them the fixed price, and the merchants sell, and they are the only persons to sell, to various builders and contractors. *Bentall* v. *Vicary* (1) therefore has no material bearing upon this case.

But there is a previous decision which has been cited, *Snelgrove* v. *Ellringham Colliery Co.* (2), a decision of Mathew J., a judge of the greatest experience in commercial matters, where the defendants, manufacturers of fire-clay goods, appointed the plaintiff the sole agent for the sale of their goods in London and the district south of York. The plaintiff found one of the partners in the manufacturers' firm selling in his area and complained of this interference. Mathew J. said: "I am of opinion that this gentleman was to be the agent for the defendants, who, I assume, are ordinary partners, and that they were not entitled to appoint any other agent in his district." McCardie J. in *Bentall* v. *Vicary* (1) and Simpson C.J. in Equity in New South Wales in the case of *Cant* v. *Miller* (2) take those words of Mathew J. as meaning that the defendants in *Snelgrove* v. *Ellringham Colliery Co.* (3) could not appoint another agent, not as meaning that they could not be vendors themselves. But, first, the defendants in that case were partners, and one partner in partnership matters can and does act as the firm; the firm acts through the partners as a company acts through its authorized officers: and moreover if those learned judges had read further they would have found these words: "Nor were they entitled to effect any sales nor transact any business connected with their firm in his district, except by means of his agency." I see no justification for treating those words, as McCardie J. has done, merely as an obiter dictum; they are as much part of the decision as are the words which precede them. In my opinion, when the appellants sell these goods they are breaking the contract which they made with the respondents, described as the merchants, that they shall have the sole right to sell. That is the view taken by Wright J., following the opinion of Mathew J. in *Snelgrove* v. *Ellringham Colliery Co.* (3) I agree with it, and the appeal must be dismissed.

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(1) [1931] 1 K. B. 253.

(2) 45 J. P. 408.

Greer L.J. I am of the same opinion. This appeal involves the construction of a document dated April 21, 1927, which on the facts of this case must be treated as the statement in writing of the contract between the parties. It is not quite clear how the contract arose. The document is signed and sealed on behalf of the parties described as "the manufacturers"; it is not signed by the parties described as "the merchants." But it must be treated as the contract between the parties, either because it was sent forward by the merchants to the manufacturers with a request for their signature, or because it was, after being signed, received by the merchants and acted on by both parties for two and a half years. Now, notwithstanding the terms of this document, the manufacturers are saying, "We are entitled to cease from supplying you with any bricks or other materials manufactured at our works. We will exercise our discretion from time to time and supply you or not as it suits our business, and we do not recognize your right to be supplied with any of our bricks or other materials." In my judgment that is a clear repudiation of the contract. It is somewhat remarkable that, notwithstanding the numerous cases in which the difference between a buyer and an agent has been pointed out, there are still innumerable persons engaged in business who do not understand the simple and logical distinction between a buyer and an agent for sale, but are content to treat the two words as synonymous. However, I can only read this contract as meaning that the manufacturers undertake, as they say in para. 3, to supply goods to the persons whom they call "selling agents" in return for the price mentioned in para. 2. Para. 1 is in these words: "The manufacturers hereby appoint the merchants sole selling agents of all bricks and other materials manufactured at their works." Para. 3 reads: "The merchants shall pay the manufacturers for all goods supplied by the end of the month following delivery"; and para. 2 is the paragraph which fixes the price to be paid by the merchants to the manufacturers. I can only read that document as an agreement in which the manufacturers are the sellers and those who are called selling agents are to be the buyers over a period of three years of the goods described in para. 1, i.e., "of all bricks and other materials manufactured at their works."

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(1) [1931] 1 K. B. 253.
(2) 13 N. S. W. S. R. 505, 509.
(3) 45 J. P. 408.

Mr. van den Berg suggested a difficulty with regard to the fixing of the price; but in my judgment it was an apparent rather than a real difficulty, because in para. 2 the sellers are agreeing that the price to the buyers is, unless otherwise agreed, to be 10 per cent. below the current market price to builders; that is, a price not ascertained at the date of the contract but ascertainable by means provided by the contract; and that which can be made certain is as good as that which is made certain by the words of the contract.

In my opinion therefore it is not necessary to consider how this contract was acted on in practice. If there had been an ambiguity and the intention of the parties had been in question at the trial, I think it might have been held that the parties had placed their own construction upon the contract and, having acted upon a certain view, had thereby agreed to accept it as the true view of its meaning. But the question was not raised, and I agree with Scrutton L.J. that it is not open to the appellants to raise it now in this Court or upon the future assessment of the damages.

With regard to the two authorities cited, they seem to me possibly to be in conflict. *Snelgrove* v. *Ellringham Colliery Co.* (1), the case before Mathew J., was one of a real agent who paid no price to the principals but was to earn a commission, just as the agent in *Bentall* v. *Vicary* (2) was an agent earning a commission and not a buyer. It may be that the exigencies of business and the surrounding circumstances dictated a construction of the contract in *Snelgrove* v. *Ellringham Colliery Co.* (1) different from that which would ordinarily be placed upon the appointment of an agent for the sale of an estate. Be that as it may, it seems to me that neither of these cases affords us any assistance one way or the other in the present case. Deciding it upon the construction of the contract between these parties I think that this appeal should be dismissed.

Slesser L.J. I am of the same opinion. In my view the whole matter turns upon the proper interpretation of the agreement of April 21, 1927. I agree with my brothers that the agreement is not one of agency at all. That being so, the legal position when a principal agrees that a certain person shall be his sole agent does not arise here, and for myself I prefer to express no opinion either on *Snelgrove* v. *Ellringham Colliery Co.* (1) or on *Bentall* v. *Vicary* (2), because although, as Scrutton L.J. has pointed out, there are some very important observations of Mathew J. in the first case with regard to sole agencies, both cases as I read them deal with the relation of principal and agent and neither of them has to do with purchasers and their vendors. The agreement in the present case is somewhat difficult to understand, because in one and the same document the same parties are described as " merchants " and as " sole selling agents," the first being a correct, but the second an incorrect, description. The appellants are under obligation to sell their goods to the merchants, who may resell them to other purchasers, and, in my opinion, so long as the agreement of April 21, 1927, remains in force the appellants have parted with the right to sell their own products themselves. During that period the merchants have been appointed sole sellers, which means sole purchasers from the manufacturers in order that they may have the sole right of selling to third parties.

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(1) 45 J. P. 408.

(2) [1931] 1 K. B. 253.

If that is the correct view of the agreement, the manufacturers have broken it, because without the consent and against the will of the merchants they have sold and are attempting to sell to persons other than the merchants. That being my view of the true construction of this agreement, I think the appeal fails.

Appeal dismissed.

Solicitors for appellants : *Burton, Yeates & Hart, for Charles, Malcolm & Wilson, Worthing.*

Solicitors for respondents : *A. M. Longhurst & Butler.*

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(1) 45 J. P. 408.

(2) [1931] 1 K. B. 253.

W. H. G.

PEASE v. W. J. SIMMS, SONS AND COOKE, LIMITED.

1931
Dec. 16, 17.

Factory Acts—Factory—" Premises on which machinery worked by . . . . mechanical power is . . . . used for . . . . construction of a building" —Building Site—Mortar Mill driven by Petrol—Manufacturing Process—Mortar made by Mortar Mill used in Construction of Houses on Site—Accident on Completed House—Separate Premises—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 105, *sub-s.* 1—*Notice of Accidents Act,* 1906 (6 *Edw.* 7, *c.* 53), *s.* 4—*Workmen's Compensation Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *s.* 28.

By s. 105, sub-s. 1, of the Factory and Workshop Act, 1901, " The provisions of this Act with respect to—. . . . (ii) accidents . . . . shall have effect as if any premises on which machinery worked by steam, water or other mechanical power is temporarily used for the purpose of the construction of a building or any structural work in connection with a building were included in the word ' factory,' and the purpose for which the machinery is used were a manufacturing process, and as if the person who, by himself, his agents or workmen, temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises ; and for the purpose of the enforcement of those provisions the person so using any such machinery shall be deemed to be the occupier of a factory."

By s. 4, sub-s. 1, of the Notice of Accidents Act, 1906, as amended by s. 28, sub-s. 1, of the Workmen's Compensation Act, 1923 : " Where any accident occurs in a factory or workshop which either—(*a*) causes loss of life to a person employed in the factory or workshop ; or (*b*) disables any such person for more than three days from earning full wages at the work at which he was employed ; written notice of the accident, ... shall forthwith be sent to the inspector of the district."

By sub-s. 3 of the same section, failure or omission to send such notice of an accident in a factory or workshop renders the occupier liable to a fine.

The respondents were contractors, who were erecting a large number of houses on two extensive building sites. An accident occurred to a workman while he was working on the roof of one of the houses, with the result that he was disabled for more than three days. There was on the building site, at a distance of 100 yards from the house where the accident occurred, a mortar mill driven by a petrol engine, and mortar made by that machine had been used in the construction of the house on which the accident occurred, as well as other houses on the building site, but the mortar mill was in no way connected with the accident in question. An accident also occurred to another workman on a completed house on another site. About twenty-five feet from that house there was a mortar mill, and there was also a concrete mixer a quarter of a mile away, but neither of these machines had any connection with the accident. No notice of either accident was sent by the respondents to the inspector of the district, as required by s. 4, sub-s. 1, of the Notice of Accidents Act, 1906, as amended by s. 28, sub-s. 1, of the Workmen's Compensation

Act, 1923. On an information against the respondents for omitting to send notice :—

Held, that although when the operations on the building sites began and the machines were being used for the purpose of the construction of the houses it might well have been contended that the whole of each building site was a factory within the meaning of s. 105 of the Factory and Workshop Act, 1901, yet, at the time when the accidents in question occurred, the places at which the accidents occurred had ceased to be parts or portions of a factory, being no longer premises at which machinery worked by steam, water or other mechanical power was being temporarily used for the purpose of the construction of a building. Therefore, the justices were right in holding that a house which was completed, or nearly completed, had become separate premises which were not a factory within the meaning of s. 105, sub-s. 1, of the Factory and Workshop Act, 1901, and the informations were rightly dismissed.

Per Humphreys J.: "I desire to guard against being supposed to hold that the language of s. 105 of the Factory and Workshop Act, 1901, operates to make a factory of an area sufficiently large to enable several hundred houses to be built upon it."

CASES stated by Bristol Justices.

At a court of summary jurisdiction sitting at Bristol an information was preferred by Miriam Blanche Pease (hereinafter called the "appellant"), under the Notice of Accidents Act, 1906 (6 Edw. 7, c. 53), as amended by the Workmen's Compensation Act, 1923 (13 & 14 Geo. 5, c. 42), against W. J. Simms, Sons & Cooke, Ld. (hereinafter called "the respondents"), for that on December 22, 1930, they were the occupiers of a factory at St. John's Lane, Bedminster, and an accident having occurred therein on that day to one Charles Wesley Brinn, of which written notice was required to be forthwith sent to the inspector of the district, they (the respondents) did not send such notice. (1)

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(1) The Workmen's Compensation Act, 1923, s. 28, provides :

"(1.) Section 4 of the Notice of Accidents Act, 1906, shall have effect as if for subsection (1) thereof the following subsection were substituted:—

'Where any accident occurs in a factory or workshop which either—

(*a*) causes loss of life to a person employed in the factory or workshop; or

(*b*) disables any such person for more than three days from earning full wages at the work at which he was employed; written notice of the accident, ... shall forthwith be sent to the inspector of the district.'"

The Notice of Accidents Act, 1906, s. 4, provides :

"(3.) If any notice with respect to an accident in a factory or workshop required to be sent by this section is not sent as so required, the occupier of the factory or workshop shall be liable to a fine not exceeding 10*l*. . . . ."

A second information was preferred by the appellant, charging the respondents with a similar offence in respect of an accident to John Joseph Walden on January 14, 1931.

The informations were heard by the justices on May 15, 1931, and were dismissed.

On the hearing of the information in Brinn's case, the following facts were proved or admitted: The appellant was one of His Majesty's Inspectors of Factories and Workshops, and was the inspector of the district to whom should have been sent written notice of any accident to which s. 4 of the Notice of Accidents Act, 1906, and s. 28 of the Workmen's Compensation Act, 1923, applied. The respondents were contractors, who, on December 22, 1930, were erecting on a large area of unenclosed land at St. John's Lane, Bedminster, 304 dwelling-houses.

On December 22, 1930, Charles Wesley Brinn, a plasterer in the service of the respondents, was working on a roof on one of the dwelling-houses. While he was tiling, his foot slipped on a batten (which was across the tiles), and he fell into a valley of an adjoining roof and injured his right knee. He was away from work for fifteen weeks, and was disabled from earning wages at work at which he was previously employed. On that date there was on the building site, at a distance of 100 yards away from the house where the accident occurred, a mortar mill driven by a petrol engine. Mortar made by that machine had been used in the construction of the house in question and was being used in the construction of other houses on the site, but the machine had no connection with the accident to Brinn and he was not employed in connection with it. The machine was not within the close or curtilage or precincts of the house on the roof of which Brinn was working, nor (so far as this was a question of fact) was that house within the area of the premises on which the machine was used. There was no machinery worked by mechanical power used on that house.

Written notice of the accident to Brinn was not sent by the respondents to the appellant.

The appellant contended that by reason of the user of the mortar mill for the purpose of the construction of the various houses which were being erected on the building site the whole area of the building site constituted premises on which machinery was temporarily used, and that accordingly the building site was a factory within the meaning of s. 105 of the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22) (1); that the accident to Brinn, having occurred in a house standing on and forming part of the building site, had therefore occurred in a factory; that written notice of such accident ought to have been sent by the respondents to the appellant; and that, such notice not having been sent, the respondents had incurred the penalty provided by sub-s. 3 of s. 4 of the Notice of Accidents Act, 1906.

For the respondents it was contended that a factory, as constituted by s. 105 of the Factory and Workshop Act, 1901, was premises on which machinery was used and not premises on which the product of the machinery (i.e., the mortar) was used; that the "premises" mentioned in the section meant a place having geographical boundaries; that the house on the roof of which Brinn was working at the material time was "premises"; that the question what were the limits of the "premises," and therefore of the "factory," was a question of fact, and that, in view of the findings of the justices, the house on which Brinn was working was not within the ambit of the factory constituted by the section, and that the house was not a factory within the meaning of the section, or of s. 28 of the Workmen's Compensation Act, 1923, or of s. 4 of the Notice of Accidents Act, 1906.

(1) The Factory and Workshop Act, 1901, s. 105, provides:

"(1.) The provisions of this Act with respect to—. . . .

(ii) Accidents; . . . .

. . . . shall have effect as if any premises on which machinery worked by steam, water or other mechanical power is temporarily used for the purpose of the construction of a building or any structural work in connection with a building were included in the word 'factory,' and the purpose for which the machinery is used were a manufacturing process, and as if the person who, by himself, his agents or workmen, temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises; and for the purpose of the enforcement of those provisions the person so using any such machinery shall be deemed to be the occupier of a factory."

The following cases were cited, or were considered by the justices: *Fenn* v. *Miller* (1); *McNicholas* v. *Dawson & Son* (2); *Back* v. *Dick Kerr & Co.* (3)

In the case of John Joseph Walden, the respondents were erecting on a large area of unenclosed land at Redcatch Lane, Bristol, 168 dwelling-houses. On January 14, 1931, Walden, who was employed in putting a roof on one of the dwelling-houses, left the house on which he was employed and went to another dwelling-house on the building site—the erection of which had been completed—to fetch some rolls of roof felting, which was stored therein. While he was lifting the rolls on to his shoulder, one of them slipped and struck and bruised his foot, and he was disabled for a period exceeding three days. It was also stated in that case that on the material date there was on the building site, at a distance of about twenty-five feet from the completed house at which the accident happened, a mortar mill, driven by a petrol engine, and at a distance of about a quarter of a mile from the house and on the building site there was a concrete mixer with a petrol engine to drive it. The concrete mixer was on wheels and was moved about the site as occasion required. The machines were both worked by mechanical power, and the mortar and concrete made by those machines had been used in the construction of the house where the accident occurred, and were being used in the construction of other houses on the site. Neither of those machines had any connection with the accident to Walden. He was not employed in connection with either of the machines, and the machines were not within the close, curtilage or precincts of the house on the roof of which Walden was working, nor of the house in which the accident occurred. Nor, so far as it was a question of fact, was either house within the area of the premises on which the machinery was used.

The justices being of opinion that the respondents' contentions were correct, dismissed the informations.

(1) [1900] 1 Q. B. 788.
(2) [1899] 1 Q. B. 773.
(3) [1906] A. C. 325.

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Sir William Jowitt A.-G. and *Wilfrid Lewis* for the appellant. The building site in this case constitutes a factory within the meaning of the Factory and Workshop Act, 1901, s. 105. If the dwelling-house in course of erection was part of the premises, it did not cease to be so merely because it was completed. The "premises" include the whole area on which building operations are going on. Cf. Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 7, where the word "factory" is defined. In *McNicholas* v. *Dawson & Son* (1) the definition of a factory was applied to machinery, where the shed itself was not a factory, but together with the machinery it constituted a factory. The Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), applied to the premises, and therefore a person using machinery was deemed to be the occupier of a factory. In *Fenn* v. *Miller* (2) the question arose whether a labourer employed on a building estate was employed in or about a factory, so as to come within the Workmen's Compensation Act, 1897.

[*Back* v. *Dick Kerr & Co.* (3) and *Andrews* v. *Andrews & Mears* (4) were also referred to.]

While the builder is in possession of a site as a builder, the site constitutes premises such as the Legislature had in mind in passing the Factory and Workshop Act, 1901. When the houses are let to householders, or sold, they cease to be such premises. The cases should go back to the justices with directions to convict.

Montgomery K.C. and *Beney* for the respondents. This Act is a penal Act and the meaning of words which are doubtful should not be extended. The word "premises" refers to a defined and not to an undefined area. It is a limiting word, and it is so used in the Sixth Schedule to the Factory and Workshop Act, 1901. In s. 149, sub-s. 1 (*b*), a non-textile factory is defined as any premises or places named in Part 2 of the Sixth Schedule wherein or within the close or curtilage of which steam, water or other mechanical power is used in aid of the manufacturing process carried on there. The popular meaning of the word "premises" is to be taken, and here it means a house or close or curtilage of a house. "Premises" cannot be intended to include the whole unenclosed land under the builder's control. The mortar mixer here cannot be said to be on the same premises as those on which the accidents occurred.

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(1) [1899] 1 Q. B. 773.

(2) [1900] 1 Q. B. 788.

(3) [1906] A. C. 325.

(4) [1908] 2 K. B. 567.

[*George* v. *Macdonald* (1) and *Metropolitan Water Board* v. *Paine* (2) were referred to.]

Sir William Jowitt A.-G. replied.

AVORY J. [stated the facts and referred to s. 4 of the Notice of Accidents Act, 1906; s. 28, sub-s. 1, of the Workmen's Compensation Act, 1923; and s. 105, sub-s. 1, of the Factory and Workshop Act, 1901, and continued :] It was contended on behalf of the appellant, the factory inspector, that by reason of the user of the mortar mill and the concrete mixer, for the purpose of the construction of the various houses which were being erected on the building site, the whole area of the building site constituted premises on which machinery was temporarily used, and that, accordingly, the building site was a factory within the meaning of s. 105 of the Factory and Workshop Act, 1901, that the accident having occurred in a house standing on and forming part of the building site had therefore occurred in a factory, and that written notice of the accident ought to have been served on the appellant.

For the respondents it was contended in each case that a factory as constituted by s. 105 of the Factory and Workshop Act, 1901, was premises on which machinery was used, and not premises on which the product of the machinery was used. I think it unnecessary to express any opinion on that contention, because in a sense it begs the question. Next, it was contended that the premises mentioned in the section mean a place having a geographical boundary, that the house on the roof of which Brinn was working at the material time was the premises, that the question what are the limits of the premises and, therefore, of the factory, is a question of fact, and that, in view of the finding of fact that the machine was not within the precincts of the house on which the man was working, nor was the house within the area of the premises within which the machine was used, the house was not within the ambit of the factory constituted by the section, and that the house was not a factory within the meaning of the section.

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(1) (1901) 4 F. 190.

(2) [1907] 1 K. B. 285.

The justices in each case expressed the opinion that the respondents' contentions were correct, and dismissed the information. They do not say which of the several contentions of the respondents was the one which they accepted or whether they accepted them all.

On consideration I have come to the conclusion in each of these cases that when the operations on these building sites began and these machines were being used for the construction of the houses, it might have been contended that the whole of the building site was a factory within the meaning of s. 105 of the Factory and Workshop Act, 1901, but that at the time when these accidents happened the places (to use a neutral word) at which the accidents happened had ceased to be part, or a portion, of the factory. In other words, that those houses at which the accidents happened were no longer premises at which machinery worked by steam, water or other mechanical power was being temporarily used for the purpose of the construction of a building.

The Attorney-General was constrained to admit that, if any one of these houses which had been built had ceased to be in the occupation of the builder, and had been let, he could no longer contend that that particular house or that place on the site remained a portion of a factory. I think that it follows that, if the houses at which the accidents happened had ceased to be premises at which machinery was being temporarily used for the purpose of the construction of the buildings, they also for the same reason ceased to be a portion of the factory.

Therefore, without adopting any one of the particular contentions put forward by the respondents, I think the justices were right, having regard to their findings of fact in each case, in dismissing these summonses, and that therefore the appeals ought to be dismissed.

HAWKE J. I agree, and I do not think it necessary to add anything.

HUMPHREYS J. I have arrived at the same conclusion, substantially, I think, for the same reasons. I desire to guard against being supposed to hold that the language of s. 105 of the Factory and Workshop Act, 1901, operates to make a factory of an area sufficiently large to enable several hundred houses to be built upon it. It seems to me that if that was the intention of Parliament they have used words which are extraordinarily inapt to express their intention, because the words are "premises on which machinery . . . . is temporarily used for the purpose of the construction of a building or any structural work in connection with a building." I am by no means convinced myself that the section does operate so as to apply at all to an extensive building site; but assuming, for the purpose of argument, that it may be so, the Attorney-General, at a very early stage of the argument, conceded that the time must come in the development of such an estate when houses on a certain portion may become separate premises, and, in my view, the time when any particular piece of ground ceases to be properly described as premises on which machinery worked by steam, water or other mechanical power is used for the purpose of the construction of a building, and therefore ceases to be part of a factory, is the time when that piece of ground has something put on it, or something done to it, which enables that piece of ground itself to be properly described as premises separated from the total premises which consist of a large building site. The Attorney-General conceded that that time at least would arrive when a house was built and let or sold. I think he also conceded that the time would arrive when a house was completed and was to be let or sold. That admission seems to me to involve that it must be a question of degree in each case, and that must be a question of fact.

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Therefore, in my judgment, assuming that the first question is decided in favour of the factory inspector—that is, that a building site may be a factory by reason of the provision of s. 105—it seems to me that the justices had to ask themselves : "Can we say that the accident here happened on premises which have become premises apart from the building site ?" I am certainly not myself disposed to say that the justices misdirected themselves in law—and that is the real question which we have to decide here—in declining to hold that a house which was completely finished in the one case, or a house which was so far finished as only to want some portion of the roof to be added to it in the other, still remained part of the original building site. I think they were correct in saying that in those cases the houses had become separate premises. They were right in holding that each of these houses had become a set of premises of itself, and had therefore ceased to be part of premises in respect of which alone it could be contended that it was a factory by reason of the machinery which was placed on it.

For these reasons I agree that the appeals should be dismissed.

Appeals dismissed.

Solicitor for the appellant : *The Treasury Solicitor.*

Solicitors for the respondents : *Smith & Hudson, for Eking, Manning, Morris & Foster, Nottingham.*

T. W. M.

VAUXHALL ESTATES, LIMITED *v.* LIVERPOOL CORPORATION.

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Nov. 18.

Public Health—Improvement Scheme—Acquisition of Land—Assessment of Compensation—Statutory Provisions — Construction—Provision that other Acts inconsistent therewith "*shall cease to have or shall not have effect*"*—Operation on future Acts—Acquisition of Land* (*Assessment of Compensation*) *Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *s.* 7, *sub-s.* 1*—Housing Act,* 1925 (15 *Geo.* 5, *c.* 14), *s.* 46.

The Acquisition of Land (Assessment of Compensation) Act, 1919, provides by s. 2 for the assessment of compensation in respect of land acquired compulsorily for public purposes according to certain rules; and by s. 7, "(1.) The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect: . . . ."

The Housing Act, 1925, s. 46, provides for the assessment of compensation for land acquired compulsorily under an improvement or reconstruction scheme made under that Act in a manner differing in certain respects from that prescribed by the Act of 1919:—

Held, even on the assumption that s. 7, sub-s. 1, of the Act of 1919 purports to apply to future Acts, that s. 46 of the later Act of 1925, in so far as its provisions for the assessment of compensation for land acquired thereunder are inconsistent with the provisions of the earlier Act of 1919, repeals by implication these provisions of that earlier Act.

Per Avory J.: Sect. 7, sub-s. 1, of the Act of 1919 on its true construction applies only to Acts which existed at the time when that Act was passed, and not to future Acts.

SPECIAL CASE stated by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919. (1)

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(1) The Acquisition of Land (Assessment of Compensation) Act, 1919, provides:—

Sect. 1: "Where by or under any statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily by any Government Department or any local or public authority, any question of disputed compensation, ... shall be referred to and determined by the arbitration of such one of a panel of official abitrators to be appointed under this section as may be selected in accordance with rules made . . . . under this section."

Sect. 2: "In assessing compensation, an official arbitrator shall act in accordance with the following rules:— . . . .

(2.) The value of land shall, subject as hereinafter provided be taken to be the amount which the land if

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VAUXHALL ESTATES, LD. v. LIVERPOOL CORPORATION.

The Corporation of Liverpool (hereinafter called "the respondents") propounded a scheme, dated March 7, 1928, under the Housing Act, 1925, Part II. (1), for the improvement of the Queen Anne Street area of the city.

On November 23, 1928, the Minister of Health made an Order confirming the scheme.

The Order incorporated the Lands Clauses Act, 1845, as modified by the above-mentioned Acts of 1919 and 1925.

The Vauxhall Estates, Ld. (hereinafter called "the claimants"), were the owners of certain freehold lands and houses thereon situate within the area of the scheme. The lands were coloured pink and blue on a map sealed with the official seal of the Minister. The lands coloured pink on the map were included in the area on account of the sanitary

sold in the open market by a willing seller might be expected to realise: . . . ."

Sect. 7: "(1.) The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect: . . . ."

[The marginal note to s. 7 is: "Effect of Act on existing enactments."]

(1.) The Housing Act, 1925, provides:—

Sect. 46: "(1.) Where land included in any improvement or reconstruction scheme made under this Part" [Part II.] "of this Act or the corresponding provisions of any Act repealed by this Act (other than land included in such a scheme only for the purpose of making the scheme efficient and not on account of the sanitary condition of the premises thereon or of those premises being dangerous or prejudicial to health) is acquired compulsorily, the compensation to be paid for the land, including any buildings thereon, shall be the value at the time the valuation is made of the land as a site cleared of buildings and available for development in accordance with the requirements of the building byelaws for the time being in force in the district:

Provided that, if in the opinion of the Minister it is necessary that provision should be made by the scheme for the re-housing of persons of the working classes on the land or part thereof when cleared, or that the land or part thereof when cleared should be laid out as an open space, the compensation payable to all persons interested in any land included in the scheme (other than as aforesaid) for their respective interests therein shall be reduced by an amount ascertained as follows: . . . .

(2.) Subject as aforesaid, the compensation to be paid for such land shall be assessed in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919."

condition of the premises thereon or of their being dangerous or injurious to health, and the lands coloured blue were so included for the purpose only of making the scheme efficient.

A dispute having arisen between the parties as to the basis of assessment of the compensation to be paid by the respondents to the claimants for their land, the respondents applied for the appointment of an official arbitrator under the said Act of 1919, which was duly made.

On July 11, 1931, the question of disputed compensation was referred to the official arbitrator.

At the hearing before the arbitrator the above-mentioned facts were proved or admitted, and it was further admitted that, in the event of the claimants' contentions hereinafter mentioned proving unfounded in law, the amount by which compensation in respect of the part of the land coloured pink on the map should be reduced in accordance with the proviso to s. 46, sub-s. 1, of the Act of 1925, was a sum equivalent to 5 per cent. on the amount of compensation ascertained by the arbitrator to be payable in accordance with that sub-section.

At the hearing before the arbitrator it was contended for the claimants: (*a*) that s. 46, sub-s. 1, of the above Act of 1925 was inconsistent with the above Act of 1919 in that it provided for the assessment of compensation on a materially different basis from s. 2 of the last-mentioned Act; (*b*) that, if that contention was correct in law, s. 46 of the Act of 1925 was, so far as related to the land coloured pink, of no effect, because of s. 7, sub-s. 1, of the Act of 1919.

It was contended for the respondents that where land included in an improvement or reconstruction scheme made under Part II. of the Act of 1925 (other than land included only for the purpose of making the scheme efficient and not on account of the sanitary condition of the premises thereon or of those premises being dangerous or prejudicial to health) was acquired compulsorily, s. 46 of the Act of 1925 repealed, modified or overruled the above Act of 1919, save to the extent mentioned in s. 46; sub-s. 2, of the Act of 1925, and accordingly that the compensation payable to the claimants in respect of the land coloured pink fell to be assessed in accordance with the said Act of 1919 as modified by s. 46, sub-s. 1, of the Act of 1925.

If the Court should be of opinion that the compensation in respect of the land coloured pink should be assessed under s. 2, sub-s. 1, of the above-mentioned Act of 1919, and without regard to s. 46 of the Act of 1925, then the arbitrator awarded that the respondents should pay to the claimants 2370*l.* as compensation, 73*l.* towards the costs of the claimants, and the fees of the award.

If the Court should be of opinion that the compensation in respect of the land coloured pink should be assessed on the basis of s. 46 of the Act of 1925, i.e., as a site cleared of buildings and available for development in accordance with the requirements of the building by-laws of the city of Liverpool, subject to the reduction factor provided by that section, then the arbitrator awarded that the respondents should pay to the claimants 1133*l.* as compensation, 55*l.* towards the costs of the claimants, and the fees of the award.

H. A. Hill for the claimants. The compensation should be assessed according to the first of the two alternative awards of the arbitrator—namely, under s. 2, sub-s. 1, of the Acquisition of Land (Assessment of Compensation) Act, 1919, and without regard to s. 46 of the Housing Act, 1925. The scheme in question was propounded by the Liverpool corporation for the improvement or reconstruction of the area to which it applied, the land in question being included on account of the alleged insanitary condition of the premises thereon. It is, therefore, a scheme which comes under the Housing Act, 1925, Part II., and not a mere private building scheme to which that Act does not apply: *Bean & Sons* v. *Flaxton Rural Council.* (1) The scheme was approved by the Minister of Health, and eventually sanctioned judicially. Before the Act of 1925 came into force, the compensation to be paid to a person whose land was compulsorily taken for the purposes of a scheme of this nature was assessed under the Acquisition of Land (Assessment of Compensation) Act, 1919. That Act, as appears from its title, amended the law as to the assessment of compensation in respect of land acquired compulsorily for public purposes, and it altered in some respects the Lands Clauses Acts, in which the whole law of compensation was previously contained. Sect. 1 provides that any question of disputed compensation shall be determined by an official arbitrator to be appointed under the Act; and s. 2 provides that in assessing compensation an official arbitrator shall act in accordance with the rules there set out, of which r. 2 provides that the value of the land shall be taken to be the amount which the land if sold in the open market might be expected to realize. The Housing Act, 1925, contains provisions of its own for the assessment of compensation to be paid to a person whose land is acquired compulsorily for the purposes of a scheme under Part II. of that Act. Sect. 46 of that Act provides, by sub-s. 1, that where the land is included in the scheme not only for the purpose of making the scheme efficient, but on account of the sanitary condition of the premises thereon or of those premises being dangerous or prejudicial to health, the compensation to be paid for the land, including any buildings thereon, shall be the value of the land as a site cleared of buildings, provided that if provision should be made by the scheme for re-housing on the land the compensation shall be reduced by an amount ascertained as therein provided; and by sub-s. 2 that, subject as aforesaid, the compensation shall be assessed in accordance with the Acquisition, &c., Act of 1919. It thus appears that where, as in the present case, land is authorized to be taken by the Act of 1925, the respective bases for the assessment of compensation to be paid for the land under the respective Acts of 1919 and 1925 are very different from each other. Under s. 2 of the Act of 1919 the owner of the land would receive compensation not only for the land itself, but also for the buildings upon it, and the compensation would not be reduced in the event of re-housing; whereas, under s. 46, sub-ss. 1 and 2, of the Act of 1925, the owner of the land would receive compensation for the land only and not for the buildings upon it, and in the event of re-housing there would be a reduction of the compensation. As regards the assessment of compensation, therefore, the provisions of the Act of 1925 by which the land is authorized to be taken are inconsistent with those of the Act of 1919. It is not, indeed, disputed here that the later provisions are inconsistent with the earlier, and the amounts of the alternative assessments have been agreed between the parties. Though the Legislature, in enacting s. 46 of the Act of 1925, no doubt had the provisions of the earlier Acquisition Act of 1919 clearly in mind, it is nevertheless submitted that the provisions of s. 46 for the assessment of compensation in so far as they differ from those of the earlier Act of 1919 are of no effect whatever. They are prevented from having effect by s. 7, sub-s. 1, of the Act of 1919, which enacts that the provision of the Act or Order by which the land is authorized to be acquired "shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect: . . . ." Certain further words which occurred in the proviso to that sub-section as it originally stood and which, if they were still in force, would prevent the claimants from raising this point, have been repealed by the Act of 1925. That sub-section on its true construction means that the provisions, not only of any existing Act, but also of any future Act, so far as inconsistent with that Act of 1919, shall be of no effect. If the intention had been to limit the sub-section to existing Acts, it would have been sufficient to say that other Acts "shall cease to have effect." The addition of the words "shall not have effect" clearly shows that the sub-section is to apply to future Acts also. Further, that sub-section of the Act of 1919 must be construed along with s. 1 of that Act, which provides that where by any statute, "whether passed before or after the passing of this Act," land is authorized to be acquired, any question of disputed compensation shall be referred to the permanent tribunal thereby created, and along with s. 2, which lays down permanent rules for the assessment of the compensation; and when so construed it seems clear that it provides that other Acts, whether past or future, which are inconsistent with it, are not to have effect. The sub-section in so providing is not in conflict with the principle of the constitution that a statute cannot bind the Legislature for the future. It does not purport to bind the Legislature absolutely for the future. It does not assume to say that the Legislature may not by express enactment repeal or modify its provisions in any way that may be deemed advisable. It only provides that until these provisions be repealed or modified by express enactment they shall prevent future provisions which are inconsistent with them from having effect. It merely seeks to prevent the provisions of the Act of 1919, including the sub-section itself, from being repealed by implication by the inconsistent provisions of any subsequent Act. That being its object, the sub-section and the other provisions of the Act of 1919, until they are expressly repealed or altered, prevail over any subsequent inconsistent provisions, for the law will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it: see Maxwell on the Interpretation of Statutes, 7th ed., p. 136.

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(1) [1929] 1 K. B. 450.

Neither the sub-section in question nor any other material provisions of the Act of 1919 have been expressly repealed by any subsequent Act, and they therefore prevail against any later provisions which are inconsistent with them. It follows that by virtue of s. 7, sub-s. 1, of the Act of 1919 the compensation should be assessed under that Act and not under the inconsistent provisions of s. 46 of the later Act of 1925.

Montgomery K.C. for the respondents. The compensation should be assessed in accordance with the second of the two alternative awards of the arbitrator—namely, under s. 46 of the Housing Act, 1925; and not under the Acquisition of Land (Assessment of Compensation) Act, 1919. The contention on behalf of the claimants that s. 46 of the Act of 1925 is rendered of no effect by s. 7, sub-s. 1, of that Act of 1919 cannot be supported. In order to understand the meaning and effect of that sub-section it is desirable to consider the later history of the legislation in regard to compensation for land taken for the purpose of improvement or reconstruction. The Housing, Town Planning, &c., Act, 1919, which was passed in July of that year, provided for the compensation to be paid for land taken for the purposes of the Act. Sect. 9 (repealed) of that Act contained provisions identical with those afterwards re-enacted as s. 46 of the Act of 1925, and thus required that where land, such as that in question, has been taken not only for the purpose of making the housing scheme efficient, but on account of the condition of the premises thereon, the compensation for the land, including any buildings thereon, should be the value of the land cleared of buildings, and that in case of re-housing the compensation should be reduced as therein provided. Shortly afterwards—namely, in the following August, the Acquisition of Land (Assessment of Compensation) Act, 1919, was passed, which contained provisions differing in some respects from those of the earlier Act. Sect. 2 provided rules for the assessment of compensation, according to which the value of the land should, subject as thereinafter provided, be the amount which the land if sold in the open market might be expected to realize. It was not desired, however, to interfere with the provisions of the earlier Act or of Orders made or to be made under it, and accordingly s. 7, sub-s. 1, of the later Act provides that the provision of the Act or Order by which the land is to be acquired shall have effect subject to the later Act, and so far as inconsistent therewith those provisions "shall cease to have or shall not have effect." The Housing Act, 1925, consolidated the provisions of the earlier Housing Acts. Sect. 46, sub-s. 1, of that Act re-enacts in identical terms s. 9 of the Housing Act of 1919, and again affirms that the compensation for land such as that now in question shall be the value of the land cleared of buildings, and that in case of re-housing it shall be reduced as therein provided; and sub-s. 2 provides that "subject as aforesaid" the compensation shall be assessed in accordance with the Acquisition, &c., Act of 1919, which was now the earlier Act. Sect. 7, sub-s. 1, of the Acquisition, &c., Act of 1919,

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VAUXHALL ESTATES, LD. v. LIVERPOOL CORPORATION.

on its true construction does not purport to apply to future Acts, such as the Housing Act, 1925. The provision in that sub-section that the provisions of other Acts or Orders "shall cease to have or shall not have effect" refers only to provisions of then existing Acts or of Orders made or to be made thereunder. It is somewhat unusual in form, but a provision in similar form occurs in certain other Acts, as for example in s. 9 of the Housing (Additional Powers) Act, 1919 (9 & 10 Geo. 5, c. 99). The side note to s. 7, sub-s. 1, clearly shows that the effect of the Act of which it forms part is to be limited to existing enactments. If the sub-section on its true construction does purport to apply to future Acts, such as the Housing Act, 1925, it is to that extent inoperative as being in conflict with the principle of the Constitution of this country that no Act can prevent the Legislature from repealing or modifying it by a subsequent Act, either expressly or by necessary implication. The provisions of the Acquisition, &c., Act of 1919, in so far as they correspond to the provisions of the later Act of 1925, are entirely repealed. Where an Act is passed containing clauses which are inconsistent with and repugnant to those of an earlier Act, it repeals by implication those of the earlier Act: see per Field J. in *Brown* v. *Great Western Ry. Co.* (1) Consequently the provisions of s. 46 of the Act of 1925 for the assessment of compensation, in so far as they are inconsistent with the provisions of s. 2, s. 7, sub-s. 1, and the other provisions of the Acquisition, &c., Act of 1919, repeal by implication these earlier provisions, including the words "shall not have effect" in that sub-section. If these earlier provisions were not repealed by the corresponding later provisions they would remain on the statute book as an inconvenient, or at least redundant, set of provisions and might thus give rise to great inconvenience. In view of these considerations the compensation payable to the claimants should be assessed under s. 46, sub-s. 1, of the Act of 1925.

Hill in reply. It is clear that s. 7, sub-s. 1, of the Acquisition, &c., Act of 1919, in providing as it does, purports to affect future Acts by which land is authorized to be acquired, unless it be expressly prevented from doing so. In so providing the sub-section is not in conflict with the law of the Constitution. Several other well known statutes operate in a similar manner. Thus, the Lands Clauses Act, 1845, unless expressly excluded, is by virtue of its own provisions incorporated in many future Acts. The Acquisition, &c., Act of 1919 is incorporated in the Housing Act, 1925, not only by its own provisions, but also by the express terms of the later Act. The case of *Blackpool Corporation* v. *Starr Estate Co., Ld.* (1), is the only case hitherto decided under the Acquisition, &c., Act of 1919, but it does not appear to have much bearing upon the present case. The provisions of the Acts in question, which enable public authorities to take land by force against the will of its owner, are of a penal character, and if the meaning of any of these provisions, such as s. 7, sub-s. 1, of the Acquisition, &c., Act of 1919, is doubtful, that construction of it should be preferred which is most favourable to the person who is being forcibly deprived of his property.

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(1) (1882) 9 Q. B. D. 744, 752.

AVORY J. The question that arises in this special case stated by one of the official arbitrators appointed under the Acquisition of Land (Assessment of Compensation) Act, 1919, appears very clearly from the several contentions of the claimants and respondents as there stated. The claimants contended that s. 46, sub-s. 1 (2), of the Housing Act, 1925, is inconsistent with the Acquisition of Land (Assessment of Compensation) Act, 1919, in that it provides for the assessment of compensation on a materially different basis from that prescribed by s. 2 of that Act of 1919 (3); and further that if that contention was correct in law, then s. 46 of the Act of 1925 is of no effect because of the provisions contained in s. 7, sub-s. 1, of that Act of 1919. (3) In answer to these contentions of the claimants the respondents contended, as they have contended before us to-day, that where land, of the description in question, included in an improvement or reconstruction scheme under Part II. of the Act of 1925, is acquired compulsorily, s. 46 of that Act repeals, modifies or overrules the provisions of the Acquisition, &c., Act of 1919, save to the extent mentioned in s. 46, sub-s. 2, of the Act of 1925, and accordingly that the compensation payable to the claimants falls to be assessed in accordance with the provisions of that Act of 1919, as modified by s. 46, sub-s. 1, of the Act of 1925.

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(1) [1922] 1 A. C. 27.

(2) See note (1) ante, p. 734.

(3) See note (1) ante, p. 733.

In order to decide between these contentions it is necessary to consider s. 7, sub-s. 1, of the Acquisition, &c., Act of 1919. [His Lordship read that sub-section and continued as follows:] Mr. Hill, who has argued this case with great ability, invites us to say that s. 7, sub-s. 1, of the Act of 1919 is to have effect to this extent, that s. 46 of the Act of 1925 is to be regarded as of no effect. In other words, we are asked to say that by a provision of this Act of 1919 the hands of Parliament were tied in such a way that it could not by any subsequent Act enact anything which was inconsistent with the provisions of the Act of 1919. It must be admitted that such a suggestion as that is inconsistent with the principle of the constitution of this country. Speaking for myself, I should certainly hold, until the contrary were decided, that no Act of Parliament can effectively provide that no future Act shall interfere with its provisions. I have come to the conclusion that s. 7 of the Act of 1919 on its true construction is restricted to existing Acts of Parliament. That conclusion is borne out by the marginal note to the section, "Effect of Act on existing enactments," but I had come to that conclusion before I noticed the words of the marginal note, and I should have come to the same conclusion without that note. That construction of the section avoids any conflict between the section and the principle of the Constitution, and gets rid of all the difficulty which would result from it.

Even if it be possible to read s. 7, sub-s. 1, of the Acquisition Act, 1919, as applying to a future Act of Parliament, the question still remains to be considered whether the provisions of s. 46 of the Housing Act, 1925—the Act which consolidates all the housing and town planning legislation—are not so inconsistent with the provisions of the Act of 1919 that the two Acts cannot stand together; because, if they are inconsistent to that extent, then the earlier Act is impliedly repealed by the later in accordance with the maxim "Leges posteriores priores contrarias abrogant." When one is considering whether or not the provisions of s. 46 of the Act of 1925 are inconsistent with those of the Acquisition Act of 1919, it is important to bear in mind that in that same year 1919 and in the same session of Parliament in which the Acquisition Act was passed, but shortly before the passing of that Act, a previous Housing Act had been passed—namely, the Housing, Town Planning, &c., Act, 1919, in s. 9 of which are found the same provisions with regard to compensation as are re-enacted in s. 46 of the Act of 1925; and, although it is true that the Acquisition Act of 1919 provides by s. 1 that where by any statute, whether passed before or after that Act, land is authorized to be acquired, any question of disputed compensation is to be referred to one of the official arbitrators appointed thereunder, and by s. 2 that in assessing compensation an official arbitrator shall act in accordance with rules there set out, yet the mode of assessing compensation under these rules is different from that prescribed under the earlier Act. Bearing in mind that s. 46 of the Act of 1925 is a re-enactment of s. 9 of the Housing, Town Planning, &c., Act, 1919, there can, I think, be no question that the provisions of s. 46 are so inconsistent with those of the Acquisition Act of 1919 that these respective provisions cannot stand together. That conclusion is emphasized when regard is had to sub-s. 2 of s. 46 of the Act of 1925 which enacts that, "subject as aforesaid," the compensation shall be assessed in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919. In other words, in 1925 the Legislature is saying that, subject to those new provisions, which are inconsistent with those of the Acquisition Act of 1919, the compensation is to be assessed in accordance with that Act of 1919. The words "subject as aforesaid" must mean that pro tanto there is an implied repeal of the provisions of the Acquisition Act of 1919.

In the result, therefore, dealing with the specific question which we are asked in this case, I come to the conclusion that the compensation in respect of the land in question should be assessed on the basis of s. 46 of the Housing Act, 1925—namely, as a site cleared of buildings and available for development in accordance with the requirements of the building by-laws for the time being in force in the city of Liverpool, subject to the reduction factor as provided by that section, and that the award on that basis should stand.

HUMPHREYS J. I am of the same opinion. One is accustomed in these Courts to listen to the argument that a particular section of an Act of Parliament does not apply to the facts of a particular case. In this case the argument for the claimant is that s. 46 of the Housing Act, 1925, does not, and never can, apply to this or any other case, inasmuch as it is utterly void and of no effect—and that in spite of the fact that that section is merely re-stating the law as it had existed in and since 1919. That is certainly an astonishing proposition, and Mr. Hill has based it upon the language of s. 7, sub-s. 1, of the Acquisition of Land (Assessment of Compensation) Act, 1919, which provides that: "the provisions of the Act or order by which the land is authorised to be acquired . . . . shall . . . . have effect subject to this Act," and further that: "so far as inconsistent with this Act those provisions shall cease to have or shall not have effect." He says that these words mean that at no subsequent time shall it be competent for Parliament to alter the law as there laid down, except in one or other of two ways. He admits very frankly that it would be open to Parliament at any subsequent time to repeal that sub-section by express enactment, and he admits that it would be open to Parliament at any subsequent time to amend that sub-section by express enactment. He says, however, that the ordinary rule of construction, which lays down that where two inconsistent provisions are found in two Acts of Parliament, the one passed subsequently to the other, the later provision shall prevail and shall be deemed impliedly to repeal the earlier provision, cannot apply to this sub-section because of its special terms. For my part I fail to follow that argument. If it is once admitted that Parliament, in spite of those words of the sub-section, has power by a later Act expressly to repeal or expressly to amend the provisions of the sub-section and to introduce provisions inconsistent with them, I am unable to understand why Parliament should not have power impliedly to repeal or impliedly to amend these provisions by the mere enactment of provisions completely inconsistent with them.

As regards the meaning of the provisions of s. 7, sub-s. 1, of the Act of 1919, I have been impressed, if I may say so, by the very able argument of Mr. Hill, and I prefer not to express any final opinion upon the question whether the sub-section on its true construction applies only to then existing Acts of Parliament or may not apply also to future Acts. If we were at liberty to decide that question in accordance with our own views of what was the intention of Parliament, I think there can be no doubt that we would all agree that the intention of Parliament was not to tie its hands for the future, but we are only at liberty to construe the terms of an Act of Parliament by reference to the words that Parliament itself has used. The language of s. 7, sub-s. 1, is certainly very curious and very unusual, and I prefer not to express any opinion upon the question whether the sub-section taken by itself ought or ought not to be read as purporting to apply to future Acts of Parliament.

Assuming, however, for the purpose of argument, in favour of the claimants, that the sub-section does purport to apply to future Acts, then it seems to me to be clear that Parliament has exercised its power of overriding the provisions of the sub-section by enacting in s. 46 of the later Act of 1925 a set of provisions which are totally inconsistent with them.

I agree, therefore, that s. 46 of the Housing Act, 1925, applies to this case, and that the compensation to be awarded to the claimants should be assessed under that section.

MACNAGHTEN J. I also am of opinion that the compensation should be assessed under s. 46 of the Housing Act, 1925; but I say nothing at present regarding the construction of s. 7, sub-s. 1, of the Acquisition of Land (Assessment of Compensation) Act, 1919.

Judgment accordingly.

Solicitors for claimants: *W. W. Wynne & Sons, for T. J. Smith & Son, Liverpool.*

Solicitors for respondents: *F. Venn & Co., for Town Clerk, Liverpool.*

J. R.

BACK (INSPECTOR OF TAXES) *v.* WHITLOCK.

1932
March 9.

Revenue—Income Tax—Income arising from Foreign Possessions—Receipt while abroad—Change of Residence to England—No substantial Alteration in Income or Possessions—Method of computing Income—When Income "first arose"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case V., r.* 1—*Finance Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 29, *sub-s.* 1 (*b*) (*ii.*).

The respondent, who had resided in the Straits Settlements for many years, during which time he was in receipt of an income arising from stocks, shares and rents in the Straits Settlements, took up his permanent residence in England on April 7, 1927. Thereafter he continued to receive such income, his holdings in Malayan investments being substantially the same as in previous years:—

Held, that the respondent's income did not first arise on April 7, 1927, so as to entitle him, under s. 29, sub-s. 1 (*b*) (ii.), of the Finance Act, 1926, to have his income tax for the financial year 1928–29 computed on the income of that year.

Fry v. *Burma Corporation* [1930] A. C. 321 applied and followed.

CASE stated by General Commissioners of Income Tax.

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the division of Dacorum in the county of Hertford held on April 19, 1931, the respondent, Mark Kingsley Whitlock, appealed against an assessment to income tax under Case V. of Sch. D of the Income Tax Act, 1918, in respect of income arising from foreign possessions for the year ending April 5, 1929.

It was admitted or proved that the respondent, having resided in the Straits Settlements for many years, took up his permanent residence in England on April 7, 1927. While residing in the Straits Settlements he was in receipt of an income from stocks, shares and rents arising in the Straits Settlements, which income continued after his arrival in England. The holdings of the respondent in Malayan investments were substantially the same in the income tax year 1928–29 as they had been in the income tax years 1925–26, 1926–27 and 1927–28. The gross income arising from such stocks, shares and rents in the income tax year 1927–28 amounted to 5261*l.*, and in the income tax year 1928–29 to 2988*l.* The respondent was assessed to income tax for the income tax year 1927–28 in the sum of 5261*l.* and for the income tax year 1928–29 in the same sum, no inquiry having been made by the income tax authorities as to his income for the income tax year 1926-27.

It was agreed that Sch. D 2 and r. 1 of Case V. of Sch. D of the Income Tax Act, 1918, as amended by the Finance Act, 1926 (1), s. 29, governed the assessment.

It was contended on behalf of the respondent: (*a*) that under s. 29, sub-s. 1 (*b*) (ii.), of the Finance Act, 1926, the income in question first arose as income arising from possessions out of the United Kingdom on April 7, 1927, when the respondent first resided in England; (*b*) that the assessment for the income tax year 1928–29 should accordingly be in the sum of 2988*l.*, which was the respondent's actual income for that year; and (*c*) that the contention advanced by the Crown was inconsistent with the view taken by them when causing the respondent to be assessed for 1927–28 in the sum of 5261*l.*

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(1) Finance Act, 1926, s. 29, sub-s. 1, provides: ". . . . any income tax in respect of profits or gains or income chargeable under . . . . Case V. of Schedule D . . . . shall be computed, subject to the provisions of this Part of this Act and subject as hereinafter provided, on the full amount of the profits or gains or income of the year preceding the year of assessment:

Provided that—

(*a*) Any person charged with income tax in respect of the profits or gains of any trade, profession or vocation which has been set up or commenced within the year preceding the year of assessment shall be entitled, on giving notice in writing to the surveyor within twelve months after the end of the year of assessment, to be charged to income tax on the amount of the profits or gains of the year of assessment; and

(*b*) In the case of income tax chargeable under . . . . Case V. of Schedule D . . . .

(ii.) where the income first arose on some day in the year preceding the year of assessment other than the sixth day of April, income tax shall be computed on the income of the year of assessment."

It was contended on behalf of the appellant: (*a*) that the said income of the respondent did not first arise within the meaning of s. 29, sub-s. 1 (*b*) (ii.), of the Finance Act, 1926, on his first taking up his residence in England, but first arose to him while he was resident in the Straits Settlements; and (*b*) that the assessment for the income tax year 1928–29 was correctly made on the full amount of the profits or gains or income of the year of assessment in accordance with s. 29, sub-s. 1, of the Finance Act, 1926.

It was admitted by the appellant that if his contentions were upheld the assessment for 1927–28 would require to be adjusted to the amount of the income of the year 1926–27.

In the course of the arguments the Commissioners were referred to the following cases: *Ormond Investment Co.* v. *Betts* (1); *Fry* v. *Burma Corporation* (2); *Colquhoun* v. *Brooks* (3); *Singer* v. *Williams* (4); *Baker* v. *Archer-Shee* (5); *Bradbury* v. *English Sewing Cotton Co., Ld.* (6); and *Simpson* v. *Maurice's Executors.* (7)

The Commissioners decided: (1.) that on April 7, 1927, the respondent first became chargeable to income tax in England; (2.) that he was in receipt of an income from stocks, shares and rents arising from investments in Malaya during the income tax years 1926–27, 1927–28 and 1928–29; (3.) that the whole of the income in question fell within r. 1 of Case V. of Sch. D of the Income Tax Act, 1918; (4.) that that said income first arose within the meaning of s. 29, sub-s. 1 (*b*) (ii.), of the Finance Act, 1926, on April 7, 1927; and (5.) that the assessment for the income tax year 1928–29 should accordingly have been made on the full amount of the income arising within that year—namely, 2988*l*.

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(1) [1928] A. C. 143.

(2) [1930] A. C. 321.

(3) (1889) 14 App. Cas. 493.

(4) [1921] 1 A. C. 41.

(5) [1927] A. C. 844.

(6) [1923] A. C. 744.

(7) (1929) 45 Times L. R. 581; 14 Tax Cas. 580.

The appellant appealed.

Sir Boyd Merriman S.-G. and *R. P. Hills* for the Crown.

Cyril King for the respondent.

The arguments were substantially the same as those advanced before the Commissioners.

ROWLATT J. It seems to me that, on the authority of *Fry* v. *Burma Corporation* (1), there is only one course open to me in this case.

The respondent, who had previously been resident abroad, came to this country on April 7, 1927, two days after the financial year had begun, and from that date he has been resident in this country. When he came here he remained the possessor of an income from foreign possessions which he had had previously.

The question arises whether he is to be treated as having had an income from foreign possessions first arising when he came to reside here, because, if it then first arose, the adjustments under s. 29 of the Finance Act, 1926, became applicable. There is no question under the Income Tax Acts of any apportionment or adjustment for income tax with regard to the date in a financial year at which a person becomes resident and so taxable. The only adjustments are adjustments with reference to the time when the income, to use a neutral word, began. If, therefore, the respondent had come here on April 3, 1927, instead of on April 7, so as to have had only two days in the relevant financial year, instead of 363 days, his position would have been the same. I observe that in *Fry* v. *Burma Corporation* (1) Lord Warrington treats as still open the question whether in that case, although the company must be treated as not having set up their business within the year, they could not have their income apportioned for income tax purposes by reason of the fact that they became resident only within the year, but I do not know to what provision of the income tax law the noble lord was referring.

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(1) [1930] A. C. 321.

Here I simply have to consider the question whether this income first arose within the year preceding the year of assessment. It does not matter that the respondent's residence first began in the year preceding the year of assessment. It seems to me that *Fry* v. *Burma Corporation* (1) lays that down quite clearly, and I cannot see how I can draw a distinction between that case and the present one. Para. (*a*) of s. 29, sub-s. 1, of the Finance Act, 1926, refers to the profits of a trade or profession which has been set up or commenced within the year preceding the year of assessment, and para. (*b*) refers to income first arising in the year preceding the year of assessment. In *Fry* v. *Burma Corporation* (1) it was held with reference to trade that, if the trade were the same, it did not matter when the conduct of the trade swam into the purview of the Income Tax Acts. How can I avoid applying precisely the same reasoning to words which are really as parallel as they can be having regard to the different subject with which they deal ? I cannot regard this income of the present respondent as first arising when the possessor of it swam into the purview of the Income Tax Acts. This appeal must, therefore, be allowed.

Appeal allowed.

Solicitor for Crown : *Solicitor of Inland Revenue.*
Solicitors for respondent : *Waller, Mager, & Cobbett.*

(1) [1930] A. C. 321.

G. F. L. B.

1932
March 10.

MANN *v.* NASH (INSPECTOR OF TAXES).

Revenue—Income Tax—Profits of Trade—Illegal Trade—Unlawful Gaming—Chargeability of Profits—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 237, *Sch. D.*

In the course of his business as an amusement caterer (to the conduct of part of which no objection could be taken on the grounds of illegality) the appellant provided licensed victuallers and others with automatic machines for use for unlawful gaming :—

Held, that, although the profits derived from these transactions were the profits of an illegal trade, they were chargeable to income tax.

Hayes v. *Duggan* [1929] I. R. 406 criticized and not followed.

Held, further, that profits made from the re-sale of certain of the machines were chargeable on the ground that only the use of the machines, and not their possession, was illegal.

CASE stated by Special Commissioners of Income Tax.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held on April 20, 1931, the appellant, E. Mann, appealed against the under-mentioned assessments to income tax made on him by the Additional Commissioners of Income Tax for the Brighton Division : (*a*) a first assessment in the sum of 3000*l*. for the year ended April 5, 1927, in respect of profits from automatic machines ; (*b*) an additional assessment in the sum of 1000*l*. for the year ended April 5, 1927, in respect of profits from automatic machines ; (*c*) an additional assessment in the sum of 2800*l*. for the year ended April 5, 1928, in respect of profits from automatic machines ; (*d*) an additional assessment in the sum of 5000*l*. for the year ended April 5, 1926, as a dealer in automatic machines.

The appellant, who described himself in his returns as an amusement caterer, had for some years carried on the business of providing automatic machines in places of public resort, such as Hastings pier, Brighton beach, and Fort Arcade, Margate. The appellant furnished the inspector of taxes with copies of his audited accounts, and he had usually been assessed to income tax, in the first assessments, in accordance with his returns on the basis of the profits shown by such accounts. Doubts arose as to the sufficiency of his returns, and the return for the year 1926–27 was not accepted, but an estimated assessment in the sum of 3000*l.* was made on him in the first assessment for that year. Inquiries revealed that there had been large increases in his capital, which were not accounted for by the profits shown by the accounts, and the appellant explained that those increases were due to profits from dealing in, or the use of, certain automatic machines known as "Fruit" or "Diddler" machines, which he had not included in his accounts or returns, because he did not regard them as liable to income tax, as the machines were of a kind that could not legally be used in this country. Additional assessments in respect of profits from automatic machines and profits as a dealer in automatic machines were thereupon made in estimated amounts under s. 125 of the Income Tax Act, 1918. The Commissioners found as a fact that there was no reason to doubt that the explanation given by the appellant was true, that the accounts furnished by him were accurate accounts of the transactions comprised in them, and that the profits omitted from his returns were in fact derived from dealing in, or the use of, "Fruit" or "Diddler" machines. There was no dispute about the figures which had been agreed between the parties.

In the course of 1924 and 1925 the appellant bought 322 "Fruit" and "Diddler" machines, of which he sold 48 at a profit of 384*l.* He was advised by counsel at that time that the machines were illegal, but he nevertheless decided to bring them into use, and those retained by him were installed mainly in licensed premises. He sold to the proprietors of the licensed houses and other places of refreshment discs for use in the machines in place of coins. The proprietors resold these discs to their customers at a small profit, and as a general rule retained 33⅓ per cent. of the gross takings, paying over the balance to the appellant. In May, 1926, the appellant was warned by the police authorities at Brighton that the use of the machines was illegal and must be discontinued. At about the same time he received a similar warning from the police at Margate. He thereupon removed all his "Fruit" and "Diddler" machines and sold them at a loss.

The Commissioners drew attention to the fact that the use of "Fruit" or "Diddler" machines of the same type as those used by the appellant had been held by the Court of Criminal Appeal to be illegal, and that it had been held that even a members' club in which similar machines were installed was to be deemed a common gaming house: see *Daniels* v. *Pinks.* (1) The Commissioners found that many successful prosecutions had been instituted against persons responsible for the use of them. The appellant himself had not been convicted of any offence in relation to the machines, and he was not aware of any convictions against other persons for the use of similar machines having occurred before November, 1926.

The Commissioners came to the conclusion that the provision of the machines formed part of the appellant's ordinary business, and that he was not entitled to claim that the portion of his profits derived from them was immune from taxation on the ground that it had been earned by unlawful means. He had also engaged for a short time in the trade of dealing in the machines, and the profits of that trade were chargeable to income tax. They therefore rejected the appeal in principle, and amended the assessments in accordance with the agreed figures, reducing the assessment of 3000*l.* for 1926–27 to 2652*l.*, discharging the additional assessment for that year, increasing the additional assessment for 1927–28 to 13,139*l.*, and reducing the assessment on profits as a dealer to 384*l.*

The appellant appealed.

St. John Field for the appellant. The Commissioners were wrong. The provision of, and dealing in, machines made for unlawful gaming is an illegal business, the profits of which are not chargeable to tax. The application of the Income Tax Acts is to be confined to lawful trade and to trade carried on in a lawful manner: per Scrutton L.J. in *Inland Revenue Commissioners* v. *von Glehn & Co.* (2) That principle was adopted in *Hayes* v. *Duggan* (3), where it was held that profits

(1) [1931] 1 K. B. 374.
(2) [1920] 2 K. B. 553, 572.
(3) [1929] I. R. 406.

derived from carrying out a sweepstake, being profits derived from a criminal enterprise, were not assessable. The dicta of Denman J., in *Partridge* v. *Mallandaine* (1), that the profits of an unlawful vocation could be taxed, and that even a systematic receiver of stolen goods would be chargeable on the profits which he made, were purely obiter and were omitted from the report of the case in the Law Reports. (2)

R. P. Hills (*Sir Thomas Inskip A.-G.* with him) for the Crown. The Commissioners were right. A distinction must be drawn between a trade which is wholly illegal and one which is legal but from which illegal profits are made. Under the first head, profits derived from a wholly illegal trade—for instance, that of a burglar—may not be chargeable, but, under the second head, if illegal profits are made from the conduct of a lawful business—for instance, if profits are made by a publican from the sale of liquor after permitted hours, or by a trader as the result of fraudulent misrepresentations as to his wares—those illegal profits are not severable from the profits which are made legally, but all are chargeable. Here the trade of an amusement caterer is perfectly legal, but part of the profits derived from it by the appellant was made by illegal means. In *Minister of Finance* v. *Smith* (3), the remarks of Scrutton L.J. in *Inland Revenue Commissioners* v. *von Glehn & Co.* (4) were commented on by Lord Haldane, who said that the members of the Judicial Committee must not be taken to assent to the suggestion that the Income Tax Acts are necessarily restricted in their application to lawful businesses.

Field in reply. There is no question here of mixed legality and illegality. The appellant's trading in these machines was illegal from start to finish, since there was never anything that could be done with them except that which was illegal, to wit, unlawful gaming.

ROWLATT J. In this case the appellant was an amusement caterer, and he owned for the purpose of his business a number of automatic machines to the use of which no exception could be taken and from which he made profits. He also concerned himself with certain machines, which were made for what the law treats as unlawful gaming. The mere possession of the machines is not unlawful, but their use for gaming constitutes an offence. These last-named machines he placed with the proprietors of public premises, principally licensed victuallers, so that persons resorting to the premises might indulge in gaming by the use of them. The profits which thus accrued were divided between the appellant and the occupier of the premises. The appellant was, therefore, a party to illegal gaming.

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(1) (1886) 2 Tax Cas. 179, 181.

(2) 18 Q. B. D. 276.

(3) [1927] A. C. 193, 197, 198.

(4) [1920] 2 K. B. 553, 572, 573.

The question which arises is whether the profits which arose from the use of these machines can be charged to income tax as income in the hands of the appellant. The broad position is taken on his behalf that the Income Tax Acts, when they tax the profits of any "trade, manufacture, adventure or concern in the nature of trade," for those are the widest words (1), impliedly exclude the profits of an illegal trade. To put it in another way, it is argued that an illegal trade is not a trade within the meaning of the Income Tax Acts. That is, as Lord Haldane pointed out in *Minister of Finance* v. *Smith* (2), simply a question of the construction of the words used.

The Commissioners treated the use of these machines by the appellant as merely part of his trade as an amusement caterer. Mr. Field, however, has contended that the profits derived from that use ought to be treated as the profits of a separate trade. He made that point because in *Hayes* v. *Duggan* (3) a difficulty was felt in saying that, if a trade is not entirely illegal but its exercise includes some illegal transactions, it is possible to go through the books and strike out the illegal transactions and reduce the profits of the business by their elimination.

At the outset I find myself in the difficulty that the Commissioners have found that the trade of the appellant is all one trade. If that finding is accepted the case dealt with by Mr. Field's argument is not reached at all. But I do not want to decide the case on that narrow ground, because I think that the question whether the Income Tax Acts are limited in the way suggested ought to be decided.

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(1) See Income Tax Act, 1918, s. 237. (2) [1927] A. C. 193, 198.
(3) [1929] I. R. 406.

In the present case some of the appellant's profits arose from the fact that he bought certain machines and later resold them at a profit. There can be no ground for saying that that profit is not chargeable because, as I have said, it is not illegal merely to obtain or to possess the machines.

The broad question whether the profits of an illegal trade can be taxed was adverted to by Denman J. in *Partridge* v. *Mallandaine.* (1) I do not think that those dicta carry the matter any farther. The vocation of a bookmaker is not an illegal vocation, and the more emphatic remarks of Denman J. are omitted from the report of the case in the Law Reports. (2) In any case the dicta were obiter. In *Inland Revenue Commissioners* v. *von Glehn & Co.* (3) goods had been sold for export, and in exporting them the exporters had committed a violation of the law which rendered them liable to penalties and costs. The question was whether those penalties and costs could be set up as an expense of the trade or business, and it was decided that the payment of the penalties was not an expense incurred to earn the profits but that it was an expense which supervened after the profits had been earned. It was not suggested that the profits of the transaction were not chargeable because they were illegal profits, but at the end of his judgment Scrutton L.J. expressed some doubt whether the position was not that which is contended for by Mr. Field. He said (4): "If he [Denman J.] means to say that the Income Tax Acts recognize illegal businesses in the sense of businesses which it was not legal to carry on, because they were punishable, I at present very much doubt whether any such extension of the Acts is possible." But, when reference is made to *Minister of Finance* v. *Smith*, it

(1) 2 Tax Cas. 179, 181.
(2) 18 Q. B. D. 276.
(3) [1920] 2 K. B. 553.
(4) Ibid. 573.

is seen that Lord Haldane said (1): "Their Lordships have no reason to differ from the conclusion reached in [*Inland Revenue Commissioners* v. *von Glehn & Co.*], but they must not be taken to assent to any suggestion sought to be based on the words used by [Scrutton L.J.], that Income Tax Acts are necessarily restricted in their application to lawful businesses only." The Privy Council, therefore, did not assent to any suggestion that the Income Tax Acts are restricted in their application to lawful businesses. That leaves the matter open.

I cannot see why the letting out of these machines in a commercial way with a view to the reception of profits in a commercial way is not a "trade, manufacture, adventure or concern in the nature of trade" so that the profits of it are chargeable to tax. It clearly is. The question really is whether, as a matter of construction, those words are to be cut down by the overriding consideration that the trade is tainted with illegality.

The mainstay of Mr. Field's argument was *Hayes* v. *Duggan.* (2) That decision seems to have gone on the principle that no construction should be adopted which involved that the State should seek to take a profit from what it had prohibited, because it ought to have prevented the prohibited act. It was asked: "Will the Executive keep its revenue eye open and vigilant and its eye of justice closed to crime, if the crime be lucrative?" (3) I must say that I do not feel the force of that observation. Would it have made any difference if the State had kept both its eyes open, prosecuted the individual for the illegal lottery and also taxed him on the profits of it? In truth, it seems to me, all that consideration is misconceived. The revenue authorities, representing the State, are merely looking at an accomplished fact. It is not condoning it, or taking part in it. It merely finds profit made from what appears to be a trade, and the revenue laws say that profits made from a trade are to be taxed.

(1) [1927] A. C. 193, 198. (2) [1929] I. R. 406.
(3) Per Kennedy C.J., at p. 417.

Reliance was also placed on the maxim "nemo allegans turpitudinem suam est audiendus." I cannot see that the State is alleging its own turpitude in the present case. It is the appellant who is alleging his turpitude. It is also said that the State are coming forward to take a share in the profits of unlawful gaming. That is mere rhetoric. The State is doing nothing of the kind. It is merely taxing the individual with reference to certain facts. It is not a partner or a sharer in the illegality.

In these circumstances I have come to the conclusion that this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Stow, Preston & Lyttelton, for G. H. Fowler & Shaw, Brighton.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

G. F. L. B.

1932
March 16.

F. E. SELDON (INSPECTOR OF TAXES) *v.* CROOM-JOHNSON.

SAME *v.* BRUCE THOMAS.

Revenue—Income Tax—Barrister created King's Counsel—" Profession . . . . set up and commenced"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40) *Sch. D, Rules applicable to Cases I. and II., r.* 1, *sub-r.* 2.

A junior barrister on becoming a King's Counsel does not "set up" a new profession within the meaning of r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. in Sch. D to the Income Tax Act, 1918, and, consequently, his earnings are not to be computed in accordance with that sub-rule.

CASE stated by the Commissioners for the General Purposes of the Income Tax Acts for the Inner Temple.

At a meeting of the Commissioners on July 16, 1930, the respondent, Reginald Powell Croom-Johnson, one of His Majesty's counsel, appealed against an assessment of 7934*l.* 10*s.* for the year of assessment ending April 5, 1928, under Case II. of Sch. D to the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40),

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in respect of "income from profits of trade, profession or vocation of barrister-at-law." The amount of the assessment had been computed according to the profits of the year preceding the year of assessment. The respondent appealed on the ground that by reason of the circumstances hereinafter stated he had set up and commenced a profession within the year of assessment, and that the computation of the profits thereof should be made as provided in r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. in the said Schedule—namely, on the profits arising in the year of assessment.

At the commencement of the calendar year 1927, the respondent, Mr. Croom-Johnson, was practising as a barrister. On December 26, 1926, he applied to the Lord Chancellor to be appointed one of His Majesty's counsel, and he was so appointed on March 29, 1927, and was called within the Bar. By consent of both parties the appointment was treated as having been made within the year of assessment—namely, on April 6, 1927. Before his appointment the respondent carried on his practice partly in Bristol and partly in London. He had a set of professional chambers in Bristol and a barrister's clerk, and another clerk at his chambers, 1 Hare Court, in the Temple, London. He was given to understand that his application for the appointment would not be considered unless he had professional chambers and a professional address in London only. He accordingly gave up his chambers and clerk in Bristol.

By the practice of the Bar a King's Counsel is not allowed to draw pleadings, to settle interrogatories or a notice of appeal, or to advise on evidence or to appear before any Court without junior counsel, except in cases in which he may have already been engaged before his appointment. The respondent, after his appointment, declined to appear in Court without a junior counsel, even in cases in which he might have so appeared according to the above practice, or to continue to do any professional work of the sort usually done by junior counsel in the cases in which he was then engaged. From the date of his appointment the respondent began to appear in a class of case in which he had not appeared for some years before his appointment, and to be instructed by clients many of whom were different from those by whom he had been instructed formerly, and he was engaged in few of the class of cases in which he normally had been engaged. His earnings in the year of assessment were substantially less than those in the preceding year.

The respondent contended that the profession carried on as King's Counsel was in fact a different profession from that carried on by him as a barrister-at-law.

In the case of the respondent Bruce Thomas, who appealed against an assessment of 6743*l.*, and who was made a King's Counsel on April 17, 1928, within the year of assessment, the facts were substantially similar, except that the respondent had carried on his practice, and continued to do so after his appointment, in the same set of chambers, 3 Paper Buildings, Temple.

The Commissioners found that the respondents' contentions were correct in fact, and allowed the respondents' claims, but stated these cases on the requisition of the appellant.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the appellant in both cases. The respondents, in becoming King's Counsel, did not " set up . . . . within the year of assessment " a trade, profession, employment or vocation within the meaning of r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D. The place where a profession is carried on can make no difference, therefore the fact that Mr. Croom-Johnson carried it on in Bristol is irrelevant. Again, the fact that a King's Counsel may represent a different class of client after the change does not constitute the later practice a change of profession. One cannot separate businesses because of difference of procedure, as for instance, where in the case of a shipbroker one customer pays by commission on the charters while another pays a lump sum : per Scrutton L.J. in *Inland Revenue Commissioners* v. *Turnbull, Scott & Co.* (1) Both as junior counsel and as King's Counsel the respondents were carrying on the same profession, that

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(1) (1924) 132 L. T. 296, 300.

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of advocates or "mouthpieces." Domestic rules of the profession may control and limit the practice of junior counsel and King's Counsel, but it cannot alter the fact that the profession is the same. The late Lord Phillimore was not a Queen's or King's Counsel but held a patent of precedence; it could not be said that he practised a separate profession. The respondents are bound to say that they have ceased to be barristers-at-law. In fact they do not carry on a different profession, but the conditions under which they carry it on are altered. If this is a question of fact there was no evidence to support the finding.

Latter K.C. and *L. C. Graham-Dixon* for the respondents. This is a pure question of fact: per Lawrence L.J. in *Fry* v. *Burma Corporation* (1) and Lord Atkin (2), and no universal proposition is involved.

[*Currie* v. *Inland Revenue Commissioners* (3) and *Inland Revenue Commissioners* v. *Maxse* (4) were also referred to.]

This is not a question of labels, whether the respondents still continued to earn their living under the label barrister-at-law or not. The question is, are they still earning their living by the same professional activities or not; is the work substantially the same or substantially altered. Could it be said that a general practitioner is earning his living by the same activities as before when he becomes a Harley Street specialist? Learning to-day is so specialized that under the general label of a profession there may be activities so distinct that a change from one to the other may really be a change of profession. The definition of "barrister" in the Oxford Dictionary seems to confine the term to an "outer" barrister.

ROWLATT J. The question in these cases is whether these two gentlemen set up a profession when they commenced to practise as King's Counsel. I want to emphasize at the start that the question is whether they set up a new profession; it is not a question of a new business. At the same time

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(1) [1930] 1 K. B. 249, 267. Affirmed in the House of Lords [1930] A. C. 321.

(2) [1930] A. C. 333–334.

(3) [1920] 1 K. B. 801; 12 Tax Cas. 245.

(4) [1919] 1 K. B. 647, 657 12 Tax Cas. 41, 61.

I go a long way with Mr. Latter, for the respondents, when he says that one cannot decide this case by affixing labels. It does not answer the question to say that a man had been a clerk or an engineer and was still a clerk or an engineer, and was therefore in the same employment. But we are here dealing with the case of practising barristers, and in my judgment there is no narrower classification that one can make in defining the profession.

In the first case, that of Mr. Croom-Johnson, it appears that when a junior he had chambers in Bristol and also in London, and when he became a King's Counsel he had to give up the Bristol chambers. I cannot think that that circumstance throws the slightest light on the matter. A barrister practising in Bristol and a barrister practising in London, or, rather one having chambers in both places, is not practising separate professions; he is still a practising barrister. The profession of a practising barrister is that of a barrister practising in the courts of Great Britain, and wherever he is called upon to go, there he acts as a practising barrister. I think it is quite impossible to regard a change of chambers from one town to another as a relevant fact. Now, as to the fact of the barrister becoming a King's Counsel, I do not think the matter can be dealt with by construing the King's patent, or by considering it in a technical manner, but by regarding what, de facto, is the state of affairs which arises when a barrister becomes a King's Counsel. No doubt at one time he was considered to hold an office; he was paid a salary and could not appear against the Crown without a licence. What happens now is that the Sovereign confers a titular rank which is recognized in the Courts by giving the holder precedence, a seat within the Bar, and by entitling him to wear a silk gown. On the other hand, by the practice of the profession, he abstains from doing certain classes of work which he did before appointment. But he is still acting in the same way as before, practising the art of advocacy. All he does is to limit the part he takes therein, but he carries on the work of advocacy still, though in a higher degree. I do not think that there can be any distinction between the

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different cases where junior barristers become King's Counsel; the position involved is quite simple and all must come under the same head. Both the junior barrister and the King's Counsel carry on the same profession, but the latter occupy a higher rank or degree within it. Therefore I think that there was no evidence upon which the Commissioners could come to their conclusion, and the appeal must be allowed.

Appeal allowed.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Taylor, Willcocks & Co.*

W. L. L. B.

1931
July 24.

MOLINS MACHINE COMPANY, LIMITED *v.* LONDON COUNTY COUNCIL.

Metropolis—General Line of Buildings—Definition—Boundary Wall—Whether it can be taken into consideration—London Building Act, 1930 (20 *&* 21 *Geo.* 5, *ch. clviii.*), *s.* 22.

In defining a general line of buildings under s. 22 of the London Building Act, 1930, a boundary wall cannot be taken into consideration either by the superintending architect or by the Tribunal of Appeal on an appeal from his certificate.

CASE stated by the Tribunal of Appeal appointed under s. 196 of the London Building Act, 1930, to hear appeals under the provisions of the said Act.

By a request in writing dated July 26, 1930, the superintending architect of metropolitan buildings was required by Messrs. Purvis & Purvis, on behalf of the appellants, the Molins Machine Company, Ld., to define the general line of buildings on the south-western side of Crooke Road, Deptford, S.E. 8, between the points A and B marked on the plan hereinafter referred to.

On August 16, 1930, the deputy-superintending architect of metropolitan buildings made a certificate in which he certified, pursuant to s. 22 of the London Building Act, 1894, the general line of buildings on the south-western side of the street known as Crooke Road, Deptford, between the points marked C and D on the said plan, to be as shown by a strong red line on the plan annexed to his certificate. (1)

The appellants, deeming themselves to be aggrieved by the said certificate, appealed to the Tribunal of Appeal under s. 25 of the aforesaid Act of 1894 against the said certificate on the ground that there was in the circumstances no power to certify a building line under s. 22, sub-s. 1, of the said Act.

The appellants appeared before the Tribunal on November 19, 1930, to prosecute the appeal, and applied to the Tribunal for leave to amend by asking for a revision of the said general line of buildings defined as aforesaid, which amendment the Tribunal allowed.

The Tribunal, having viewed the site and the locality and having considered the said certificate, and having heard counsel on behalf of the appellants and the London County Council, and having also heard and considered the evidence adduced before them, allowed the appeal and reversed the certificate of the deputy-superintending architect in so far as it related to the general line of buildings defined by him between the points A and B on the plan annexed to the order of the Tribunal, and they decided and determined that it was unnecessary and inconvenient to define a general line of buildings longer than the line between the points A and B, and that as between the points A and B the general line of buildings was as shown by a strong green line on the said plan.

The London County Council, being dissatisfied with the said determination as being erroneous in point of law and in

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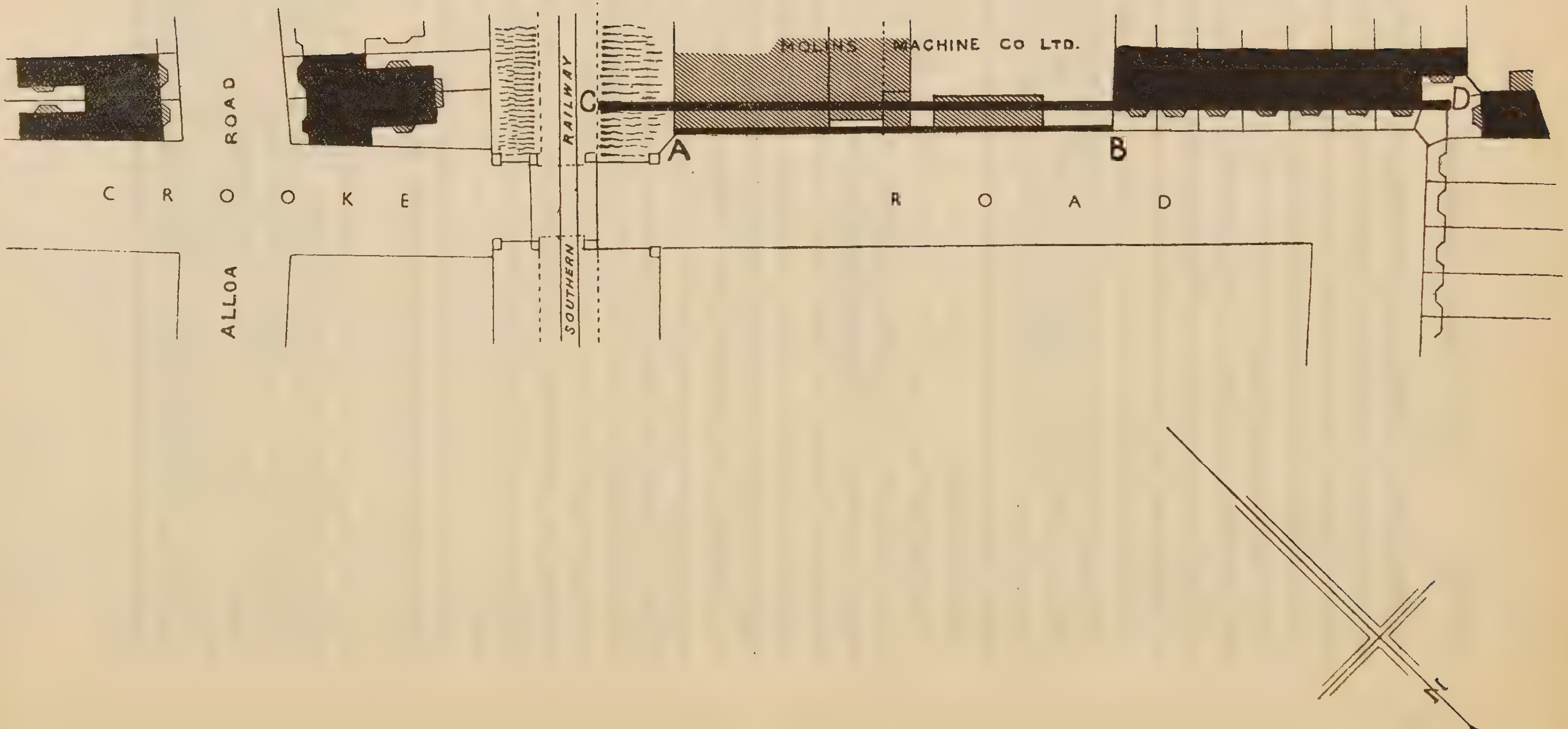
(1) *Note.*—Whenever the case speaks of a "strong red line" between the points C and D marked on the plan, that refers to the plan annexed to the deputy superintendent architect's certificate, and whenever the case speaks of a "strong green line" on the plan between the points A and B that refers to the plan annexed to the order of the Tribunal of Appeal. The plan annexed to this report is merely for the purpose of showing the locus in quo, and the "strong red line" is represented by the black line between the points C and D, and the "strong green line" is represented by the black line between the points A and B.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pursuance of s. 203 of the London Building Act, 1930, applied to the Tribunal in writing to state and sign a case setting forth the facts and grounds of the said determination, and the Tribunal in compliance with such application stated and signed the following case.

Upon the hearing of the appeal the following facts were proved or admitted before the Tribunal :—

(*a*) The frontage of the premises between the points marked A and B on the plan annexed to the order of the Tribunal, a copy of which order and plan was annexed to and formed part of the case, consisted of two permanent buildings, two temporary buildings (which it was agreed ought not to be considered in defining the general line of buildings), and a brick boundary wall 8 feet 7 inches high.

(*b*) One of the permanent buildings extended from the point A towards the point marked B for a distance of 56 feet 10½ inches in a north-westerly direction. One of the temporary buildings extended from the north-western end of the said permanent building for 18 feet 9 inches in a north-westerly direction. The other of the permanent buildings extended from the north-westerly end of the said temporary building for 10 feet 7½ inches in a north-westerly direction, and the said brick wall extended from the north-west end thereof to the point marked B. The other of the temporary buildings was behind the brick wall.

(*c*) At the north-west end of the said premises was a row of seven similar houses extending for 110 feet in a north-westerly direction to the point marked D on the plan. At the south-east end of the said premises was a railway embankment at right angles to the line between the points marked A and B.

(*d*) The deputy-superintending architect defined the general line of buildings between the said points as a straight line corresponding to a production of the front main walls of the said row of seven houses to a point on the top of the railway embankment marked C on the plan. A copy of the deputy-superintending architect's certificate, dated August 16, 1930, with plan attached, was annexed to and formed part of the case.

(e) The said wall did not form part of any building, though of substantial construction and height: it existed merely as a boundary wall to fence and protect the property lying inside it from the public highway.

(f) A copy of the statement of facts filed by the appellants was annexed to and formed part of the case.

It was contended on behalf of the London County Council:—

(a) That the boundary wall was not a "building" which could be taken into account by the Tribunal in defining the general line of buildings or choosing the length of street for such definition;

(b) That in choosing a length of street for the definition of a general line of buildings it was not competent for the Tribunal to consider what was convenient or unnecessary, but only to consider in what street, part of a street, place or row of houses the buildings for which a general building line had to be defined in fact were situated;

(c) That there was no evidence before the Tribunal upon which the Tribunal could choose a length of street for the definition of the general line of buildings other than the length from the point C to the point D;

(d) That there was no evidence before the Tribunal that the property of the appellants between the points A and B formed by itself a street, part of a street, place or row of houses.

It was contended on behalf of Molins Machine Company, Ld.:—

(a) That the front of the premises of Molins Machine Company, Ld., on the south-west side of Crooke Road, Deptford, S.E. 8, and immediately abutting thereon and some 8 feet in front of the strong red line shown on the plan accompanying the certificate of the superintending architect, formed the boundary of land lawfully occupied by a building or structure during the period of seven years immediately preceding January 1, 1895, and that s. 22, sub-s. 2, of the London Building Act, 1930, applied thereto;

(*b*) That the front of the premises of Molins Machine Company, Ld., was the general line of buildings for the said side of the street, and that it corresponded to the general line of buildings on the opposite side of the street and preserved uniformity of appearance in the street;

(*c*) That the Tribunal could confirm, reverse or vary the superintending architect's decision upon either the length of a street taken by him for definition of the general line of buildings certified by him for that length, also as regards points to which they would define the general line from those which the superintending architect had chosen;

(*d*) That the general line of buildings was a question of fact which ought to be decided with reference to the physical aspects of the street and buildings, and that the superintending architect did not have regard to these aspects in defining the general line of buildings as certified by him.

The Tribunal determined to allow the appeal, finding that it was unnecessary and inconvenient to define a general line of buildings longer than the line between the points A and B, and that as between the said points the general line of buildings was as shown by a strong green line on the plan. A copy of the order of the Tribunal and of the shorthand note of the reasons for judgment were annexed to and formed part of the case.

The questions upon which the opinion of the Court was desired were:—

(1.) Whether the Tribunal were entitled to take the said wall into account in defining the general line of buildings.

(2.) Whether the Tribunal were entitled to consider whether it was inconvenient and unnecessary to define a general line of buildings longer than the line between the points A and B.

(3.) Whether there was evidence upon which the Tribunal could in law make their determination.

The statement of facts filed by the Molins Machine Company recited that on June 3, 1930, application was made to the superintending architect of the London County Council by Molins Machine Company, Ld., for extension to their works and that consent was refused on June 30, 1930;

that subsequently on July 26, 1930, application was made to the superintending architect on behalf of the Molins Machine Company, Ld., under s. 22, sub-s. 1, of the London Building Act, 1894, for the general line of buildings on the south-west side of Crooke Road, Deptford, to be defined, and the general line was in fact defined by certificate of the superintending architect dated August 16, 1930.

The Molins Machine Company, Ld., on September 18, 1930, gave notice of appeal against the certificate under s. 25 of the London Building Act, 1894, and the grounds of appeal were "that the proposed extensions are to be erected upon land lawfully occupied by a 'building or structure at the commencement of the Act or at any time within seven years previously,' and that s. 22, sub-s. 2, applies hereto and that therefore the superintending architect had no power to certify a building line or at all under s. 22, sub-s. 1, of the Act. Further, that the general line of buildings on the south-west side of Crooke Road, Deptford, is that of the front of the premises of Molins Machine Company, Ld., immediately abutting on the said road and some eight feet in front of the strong red line shown on the plan accompanying the said certificate of the superintending architect and referred to therein."

Montgomery K.C. and *A. M. Trustram Eve* for the London County Council. The case raises an important question—namely, whether the Tribunal of Appeal were right in taking into consideration the boundary wall of the Molins Machine Company's premises when deciding what was the general line of buildings. Sect. 22 of the London Building Act, 1930, provides that "no building or structure shall without the consent in writing of the Council be erected or brought forward . . . . beyond the general line of buildings in any street," and also provides for the defining of the general line of buildings by the superintending architect when so required. Sect. 23 shows that there may be buildings or structures projecting beyond the general line of buildings, and such buildings or structures are not required to be taken down, but if they are destroyed at any time or rebuilt they may be required to be set back to the general line of buildings. Sect. 24 provides for the giving of notices of a certificate defining a general line of buildings to the owners of houses within fifty yards on either side of the house or land to which the certificate relates. The general line of buildings in any street has to be ascertained on the actual facts with reference to the physical aspects of the street and the buildings in it, and not what might be considered a better line of buildings than that which actually exists. In this case the superintending architect defined a general line of buildings by reference to all the buildings in the street as far as the railway bridge. The Tribunal of Appeal have taken the two permanent buildings belonging to the Molins Machine Company and the boundary wall and said that that was the general line of buildings, and they have disregarded the general line of buildings found by the superintending architect having regard to the other buildings in the street. A boundary wall is not a building or structure and ought not to be taken into consideration in fixing the general line of buildings in any street. A general line of buildings in a street cannot be determined by only one building. In order to have a line of buildings there must be at least two buildings, and in order that there shall be a general line of buildings there must be at least three buildings. Here the Tribunal of Appeal have had regard to only two out of the nine buildings in the street.

W. T. Creswell for the Molins Machine Company, Ld. No question of law is involved in this case. The Tribunal of Appeal were entitled under s. 204 of the London Building Act, 1930, to do what they have done. It was held by the Divisional Court in *In re London County Council and the London Building Act*, 1894 (1), that where the general building line is to be determined and drawn within s. 22 of the London Building Act, 1894, was a question of fact which ought to be decided with reference to the physical aspect of the street and buildings, and that a Tribunal of Appeal, on an appeal from the certificate of the superintending architect, in fixing the building line could take different points from which and to which they would define the general building line to those which the superintending architect had chosen. It was held in *Ellis* v. *Plumstead Board of Works* (1) that a boundary wall was a " building, structure or erection " within the meaning of s. 75 of the Metropolis Management Act, 1862. In *Rex* v. *Denman and the London County Council. Ex parte Palace Theatre Co.* (2) a magistrate had found as a fact that a certain construction erected by the Palace Theatre Company in front of the general line of buildings was a " structure " within s. 22 of the London Building Act, 1894. The Divisional Court held that the question was one of fact, and as there was evidence upon which the magistrate could come to his conclusion the Court would not compel him to state a case. That case is directly in point here. There was evidence upon which the Tribunal of Appeal could find that the line they fixed upon was the general line of buildings. It was not necessary for the Tribunal to take into account the whole of the buildings in the street.

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(1) (1904) 91 L. T. 501.

[Swift J. The point against you is that the Tribunal of Appeal has fixed the general line of buildings by looking at only two out of the nine buildings in the street, and those two buildings are in the ownership of the applicants.]

The fact that the buildings by regard to which the Tribunal of Appeal fixed the general line of buildings are in one ownership is immaterial.

[Charles J. The Tribunal have not made use of any comparison with the other buildings in the street.]

Swift J. We need not trouble you further, Mr. Montgomery. There is, in the borough of Deptford, a street which is known as Crooke Road; it is divided into two quite separate parts by a railway line which runs, carried on a bridge, over it. The railway line causes, as we were told by Mr. Creswell, an hour glass, where the middle has been squeezed in, and the railway line obviously divides the two parts of Crooke Road into

(1) (1893) 68 L. T. 291; 57 J. P. 359. (2) (1907) 71 J. P. 279.

two quite different types of streets. On the western side of the railway line there are some buildings, built right up to the highway, belonging to the Molins Machine Company, Ld. Beyond those buildings there is a vacant piece of land, separated from the roadway by a wall, and beyond that wall still going west is a terrace of seven houses which is set back from the roadway for some distance, and which has, in front of each house, a small yard or garden or area divided from the roadway by a small wall upon the top of which is erected an iron fence. That is the position of the portion of Crooke Road which is to the west of the Southern Railway where it crosses it.

Messrs. Molins Machine Company, Ld., are the owners of the buildings bearing their name, which are three or four in number, consisting of a large permanent building erected close up to the road, a second smaller permanent building also erected close to the road, and two temporary buildings which are erected close to the road; they also own the land which is enclosed by the wall. Owning these buildings and this unbuilt-on land which is inside the wall, and desiring to build upon the unbuilt-on land, and I suppose desiring to make their position quite assured, although they say they have the right to build upon it whatever the general building line may be, they applied to the London County Council, who are the building authority for the district in which this property is situated, to define, by their superintending architect, the general line of buildings in Crooke Road. The superintending architect went and saw the place, and gave a certificate defining the general line of buildings. He looked at the whole of the road from the railway bridge down to the place where it turns around an L-shaped corner towards another highway. He determined as a matter of fact that the general line of buildings ran from a point which he marked D upon a plan which he signed on August 16, 1930, to a point which was marked C on the same plan on the railway embankment; that is to say, he looked at the nine buildings which he found in that road. He found seven dwelling-houses side by side at a distance back from the highway; he found two permanent buildings abutting on the highway in the possession of Messrs. Molins Machine Company, Ld., and what he said was: the general line of buildings in this street is the frontage of the seven buildings out of the nine, and not the frontage of the two out of the nine; and he drew his line from the point which is marked D upon the plan, which is exhibited to the special case which we are considering, to the point marked C. Drawing his line in that way had the effect of making the general line of buildings such as to make it impossible for Molins Machine Company, Ld., unless they come within a certain exception, which they say they come within, and which they may or may not come within—I do not know, and it is immaterial for the purpose of our decision to discuss—to put any building on the unbuilt-on land which is behind their boundary wall nearer the street than that general line of buildings without the consent of the County Council in writing. One can readily imagine that that was a matter which aggrieved Molins Machine Company, Ld., and they appealed, as they were entitled to do, from the decision of the superintending architect expressed in his certificate to a Tribunal of Appeal which is constituted under the Act. The Tribunal considered this matter; they viewed the premises, and came to certain conclusions of fact. They were asked to state a case under s. 203 of the London Building Act, 1930, which provides that they may state a case for the opinion of this Court on any question of law submitted to them, and they have stated a case in which they have set out the facts with regard to this particular street as I have stated them. But before they stated that case they themselves came to certain conclusions of fact. They came to the conclusion of fact that it was unnecessary and inconvenient to define a general line of buildings longer than the line between the points A and B. They also came to the conclusion of fact that they might take into account in defining the general line of buildings the existence of the wall which divided the appellants' land from the highway. Having come to those conclusions as a matter of fact, they ask us whether as a matter of law they were entitled on the evidence before them to arrive at such a determination. In my opinion they were not. I do not think that when they were considering what the general line of buildings in a particular street was they had any right to take into consideration the existence of a wall or boundary or fence of any kind which was not in itself a building. Sect. 22 provides that "no building or structure shall without the consent in writing of the Council be erected or brought forward . . . . (*a*) beyond the general line of buildings in any street or part of a street place or row of houses in which the same is situate if the distance of such line of buildings from the highway does not exceed 50 feet." It is perfectly clear that when there is a building line or a general line of buildings in any street a structure of any sort must not be erected beyond that general line of buildings nearer the highway unless it is more than 50 feet from the highway. But that does not say that any structure is to be considered to be a building for the purpose of determining what the general building line is. The general building line is to be the general line of buildings, and "building" means something more than a structure or an erection. Once a general line of buildings has been defined it is unlawful to put a structure or any erection beyond it, and if any structure is erected beyond the general line of buildings, as was pointed out in *Ellis* v. *Plumstead Board of Works* (1), an offence will be committed. In determining what the general line of buildings is one does not look at erections or structures which may be offences if they are brought over the general line of buildings, and which are not buildings to enable you to determine what that general line is. So here it seems to me that the Tribunal was wrong in considering that this wall could enable them to fix a general line of buildings. I think that in order to do that they were as a question of fact bound to look at the existing buildings as a whole, and make up their minds, as a question of fact, what was the general line of buildings. Here they have taken into consideration the existence of this boundary wall, which it seems to me they ought not to have done. But I venture to think that, even

(1) 68 L. T. 291; 57 J. P. 359.

taking that wall into consideration, their decision would not necessarily be bad, because it might have been supported on the ground that they were entitled to take the points A and B, and to say that a line drawn between those points was the general line of buildings and to draw that line according to the buildings which were upon Molins' land, and if they had done that, then, indeed, the fact that the wall extended beyond the buildings—and even the fact that they had taken that wall into consideration—would not in my opinion vitiate what they have done. But here I think they have gone much further than that; they have considered that it was inconvenient and unnecessary to define a general line of buildings longer than a line between the points A and B, and they have asked us whether they were right in law in so deciding. The answer to that question is: this is a pure question of fact, and it is entirely a matter for you; but you are there as a judicial tribunal and you must deal with the questions which come before you upon evidence, and there is no evidence, in my view, that it is inconvenient and unnecessary to define a general line of buildings longer than the line between the points A and B. On the contrary, having seen the evidence, having considered the plans, and having heard the arguments, it seems to me that it is highly inconvenient and unnecessary to divide Crooke Road lying to the west of the railway into two parts. It is obviously one street and ought to be dealt with as one whole street, and I do not think there is any evidence justifying the separation of it into two parts in the way that the Tribunal have done. What they have done, in fact, has been to select that piece of land which runs alongside the highway which belongs to the Molins Machine Company, and to separate that from its neighbours without any consideration to the continuity of the neighbours' interests with the interests of the owners of this piece of land. I think that is contrary entirely to the spirit of this Act of Parliament.

Then the third question which they ask is: Whether there was evidence upon which they could, in law, make their determination? I think there was not. The consequence of what they have done has been this: that the street may be—it may be in spite of the order which we are going to make, I do not know—but certainly in consequence of what they have done, the street certainly may be made more narrow. Certainly the area may be diminished. The whole object of this Act is to provide for wider streets in the district under the jurisdiction of the London County Council, and if this decision were to stand, so far as it is a matter of law binding upon the Tribunal itself or upon their successors, it seems to me that it would be quite contrary to the Act of Parliament.

In those circumstances and for those reasons I think that the Tribunal came to a wrong conclusion in fact; that they had no business to consider that boundary wall in determining what the building line was; that they had no evidence upon which they could fix the general line of buildings as they did, and no evidence upon which they could say that the superintending architect's certificate was wrong. I think, therefore, that their certificate should be set aside and that the superintending architect's certificate should be restored.

Charles J. I agree, and I only desire to add a few words upon the statute itself. It is to be observed that the preamble of the Act is as follows: "Whereas it is expedient to consolidate the enactments relating to streets and buildings in London whereby provision is made for the purpose of securing a proper width and direction of streets . . . . the securing of more light, air and space round buildings and generally with respect to the control and regulation of streets and buildings." Such is the preamble of the Act. I do not desire to go over the ground again which has been traversed by my Lord in his judgment. In this particular case what has happened is this: The Tribunal of Appeal have considered it inconvenient and unnecessary to go outside the particular buildings which are the property of the Molins Machine Company, Ld., who were the applicants to the superintending architect for a certificate determining the general line of buildings in this street. I cannot understand how it is possible to arrive at any general line of buildings if no buildings are considered other than the particular buildings in respect of which the application for the certificate is being made. If that is done all matters of comparison are eliminated, which appears to be essential before one can arrive at any proper conclusion in regard to the matter. Here there was no evidence at all, so far as I can see, upon which the Tribunal of Appeal could come to the conclusion that it was inconvenient or unnecessary to go outside these particular buildings. They did not go outside the premises of the Molins Machine Company in arriving at their decision, although in truth and in fact there were seven dwelling-houses undoubtedly contiguous to these particular premises, and which in my judgment ought to have been considered if a general line of buildings was to be properly defined. The superintending architect did consider the whole of the buildings to the westward of the railway line—I think properly—and he arrived at a general line of buildings which was consistent with a consideration of all the buildings on the western side. Let us see what is the result of failing to consider these other buildings to the westward of Molins Machine Company. Sect. 22 says: "No building or structure shall without the consent in writing of the Council be erected or brought forward (notwithstanding that there are gardens or vacant spaces between the line of buildings and the highway) (*a*) beyond the general line of buildings in any street or part of a street place or row of houses in which the same is situate if the distance of such line of buildings from the highway does not exceed 50 feet." Now what is the result of the determination of this Tribunal? If it is a general line of buildings and is to be treated in a logical way, it is to be extended to point D in front of the seven houses which are contiguous to Molins Machine Company's buildings. Those seven houses have plots in front of them (whether they are gardens or areas I do not know) but a continuance of that line would make, as part of the general line of buildings and as a guide to the general line of buildings, a small wall with some railings upon the top. In my judgment that sort of boundary wall, which in this case is a very light structure in

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front of the houses, cannot be regarded as the proper spot at which to make the general line of buildings. More than that, it has been stated quite frankly by Mr. Creswell that the probable result of an adherence to the decision of this Tribunal of Appeal would be that all those seven houses would advance themselves to the little fence which is in front of them. The result would be inevitably to narrow the road, to make its width less, to make its air space less, and it seems to me that that would produce a result which would be entirely antagonistic to the very object with which this Act was passed. In my view the superintending architect applied the right principle and came to the proper decision, and there was no evidence upon which the Tribunal of Appeal could find that it was unnecessary or inconvenient to go outside these particular premises for the reasons that I have indicated.

Appeal allowed.

Solicitor for the London County Council: *S. A. R. Preston Hillary.*

Solicitors for Molins Machine Company, Ld.: *Sandom, Kersey & Tilleards.*

R. F. S.

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PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

THE

LAW REPORTS.

Under the Superintendence and Control of the
NCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES

KING'S BENCH DIVISION.

(Including Divorce, Admiralty, Ecclesiastical, and Railway and Canal Commission Cases.)

1932.—Vol. I. K.B.D.

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[*For Names of Editors and Reporters see Inside.*]

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET,
LONDON, W.C. 1,
AND
Printed by W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

BIBL. LONDIN.

"THE LAW REPORTS, 1932," for January, consist of :—

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